No. _____

IN THE
Supreme Court of the United States

MICHAEL J. BIESTEK,
Petitioner,

v.

COMMISSIONER OF SOCIAL SECURITY,
Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When assessing an applicant's eligibility for social security benefits on the basis of a disability, an administrative law judge ("ALJ") must determine whether the applicant "can make an adjustment to other work." 20 C.F.R. § 404.1520(a)(4)(v). This determination must be supported by substantial evidence. *See* 42 U.S.C. § 405(g). In making the determination, an ALJ is authorized to call a vocational expert to testify about other work available to an applicant. *See* 20 C.F.R. § 404.1566(e). These assessments occur hundreds of thousands of times annually.

The question presented is:

Whether a vocational expert's testimony can constitute substantial evidence of "other work," 20 C.F.R. § 404.1520(a)(4)(v), available to an applicant for social security benefits on the basis of a disability, when the expert fails upon the applicant's request to provide the underlying data on which that testimony is premised.

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PETITION FOR A WRIT OF CERTIORARI

Michael J. Biestek petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The decision of the Sixth Circuit (Pet. App. 1a) is reported at 880 F.3d 778 (6th Cir. 2017). The decision of the district court (Pet. App. 25a) is unreported.

JURISDICTION

The judgment of the Sixth Circuit was entered on December 27, 2017.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 405(b)(1) provides:

> Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure.

42 U.S.C. § 405(g) provides:

> The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive.

20 C.F.R. § 404.1520(a)(4)(v) provides:

> At the fifth and last step, we consider our assessment of your residual functional capacity and your age, education, and work experience to

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[1] The district court had jurisdiction over this case pursuant to 42 U.S.C. § 405(g).

see if you can make an adjustment to other work. If you can make an adjustment to other work, we will find that you are not disabled. If you cannot make an adjustment to other work, we will find that you are disabled.

INTRODUCTION

A person is not eligible for social security disability benefits if the person can "make an adjustment to other work." 20 C.F.R. § 404.1520(a)(4)(v). This case presents the question whether the Social Security Administration may permissibly deny benefits based on only a vocational expert's testimony that "other work" exists, when the vocational expert refuses to disclose the data underlying that testimony. There is a well-established, and entrenched, conflict among the circuits on this question, and this case presents the ideal vehicle for this Court to resolve the issue.

Applications for social security benefits on the basis of disability are first reviewed by either an employee of the relevant state agency or an employee of the Social Security Administration ("SSA").[2] 20 C.F.R. §§ 404.1503(a)–(b), 416.903(a)–(b). If an application is denied, the applicant may request reconsideration. 20 C.F.R. §§ 404.907, 416.1407. If the application is denied again upon reconsideration, the applicant may request review by an administrative law judge ("ALJ"). 20 C.F.R. §§ 404.929, 416.1414. The ALJ must make factual

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[2] This petition will use the term "social security benefits" to refer to both Social Security Disability Income, *see* 42 U.S.C. § 423(a), and Supplemental Security Income, *see* 42 U.S.C. § 1381(a). For the purposes of the question presented, the distinctions between the two programs are immaterial.

findings regarding an applicant's eligibility for social security benefits pursuant to a five-step process laid out in 20 C.F.R. § 404.1520(a)(4) and repeated in 20 C.F.R. § 416.920(a)(4). Each of these findings must be supported by substantial evidence. *See* 42 U.S.C. § 405(g). Under the fifth of these steps, the ALJ must determine whether the applicant "can make an adjustment to other work." 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). To make this finding, ALJs may rely on vocational experts who testify regarding jobs that would be available to an applicant given the applicant's disability, age, education, and work experience. 20 C.F.R. §§ 404.1566(e), 416.966(e).

Petitioner Michael Biestek applied for social security benefits on the basis of disability in light of a severe, and disabling, physical impairment. Pet. App. 3a. During a hearing before an ALJ, a vocational expert testified regarding various jobs that would have been available to Mr. Biestek notwithstanding his disability. Pet. App. 116a-117a. When requested by Mr. Biestek, the vocational expert declined to produce the data and analyses underlying her conclusions, citing "the confidentiality of her files." Pet. App. 20a, 118a-119a. The ALJ refused to require the expert to produce this information, even in a redacted form. Pet. App. 20a, 118a-119a. The ALJ then denied Mr. Biestek disability benefits for the full time-period specified in his application, finding based on only the expert's testimony that Mr. Biestek could have secured certain forms of employment for a limited period of time. Pet. App. 78a-79a, 109a-110a.

Reviewing the ALJ's findings for substantial evidence, The Sixth Circuit affirmed the ALJ. Pet. App. 24a. In its decision, the court recognized that it was ruling on a question over which there was "a divide . . . between the Seventh Circuit and several other circuits that have staked a position." Pet. App. 20a. In ruling that "substantial evidence" supported the ALJ's finding of other work available to Mr. Biestek, despite the expert's refusal to produce any data whatsoever substantiating her conclusion, the Sixth Circuit joined the Second and Ninth Circuits. *See* Pet. App. 21a-22a; *Brault v. Soc. Sec. Admin., Comm'r*, 683 F.3d 443, 450-51 (2d Cir. 2012); *Bayliss v. Barnhart*, 427 F.3d 1211, 1217-18 (9th Cir. 2005). The Seventh Circuit has held directly to the contrary: a vocational expert's testimony cannot constitute substantial evidence of other work available to a social security benefits applicant if the expert fails to produce on demand any data underlying the expert's conclusions. *See McKinnie v. Barnhart*, 368 F.3d 907, 911 (7th Cir. 2004) (per curiam); *Donahue v. Barnhart*, 279 F.3d 441, 446-47 (7th Cir. 2002).

As the number of cases addressing this question demonstrates, the issue arises frequently because the § 404.1520(a)(4)(v) determination must be made in hundreds of thousands of cases each year before an applicant receives social security benefits on the basis of a disability. *See* Soc. Sec. Admin., SSA Pub. No. 13-11826, *Annual Statistical Report on the Social Security Disability Insurance Program, 2016* tbl. 65 (Oct. 2017) (finding that from 1999 to 2015, 30-40% of all medical-based denials of benefits, of which there are hundreds of thousands, were based on the applicant's ability to do other types of work) (hereinafter "SSA Data"),

http://www.ssa.gov/policy/docs/statcomps/di_asr/2016/di_asr16.pdf. This issue is also important, as an adverse ruling automatically renders an applicant ineligible for valuable government benefits. This circuit split, therefore, frustrates the fair and uniform distribution of federal benefits.

This case is a clean vehicle for resolving this question. The facts are undisputed. The Sixth Circuit squarely held as a matter of law that the vocational expert's testimony—absent any of the underlying data Mr. Biestek requested—could constitute substantial evidence of other work available to Mr. Biestek under § 404.1520(a)(4)(v). Had Mr. Biestek's case arisen in the Seventh rather than the Sixth Circuit, the case would have come out the other way. Indeed, the Sixth Circuit expressly identified the conflict among the circuits in its decision.

The petition for certiorari should be granted.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

Under the Social Security Act, individuals with a qualifying disability may receive supplemental security income ("SSI") if they present sufficient financial need, 42 U.S.C. § 1382(a), and social security disability insurance ("SSDI") if they have worked for a designated period of time and paid sufficient Social Security taxes on their income, 42 U.S.C. § 423(a).

To be eligible for either form of social security benefits on the basis of disability, the applicant must be unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental

impairment" that is expected to result in death or last for at least twelve continuous months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). This requirement includes an inability to perform both the applicant's prior work and any work that exists in significant numbers nationally or in the applicant's region, taking into consideration the applicant's age, education, and work experience. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Initial responsibility for determining eligibility rests with either the relevant state agency authorized to make disability determinations or the Social Security Administration. 20 C.F.R. §§ 404.1503(a)–(b), 416.903(a)–(b). An applicant who receives an adverse determination may appeal the determination by, first, petitioning for reconsideration, 20 C.F.R. §§ 404.907, 416.1407; second, seeking a hearing before an administrative law judge, 20 C.F.R. §§ 404.929, 416.1414; third, requesting review by the SSA Appeals Council, 20 C.F.R. §§ 404.967, 416.1467; and fourth, seeking judicial review, *see* 42 U.S.C. § 405(g); 20 C.F.R. §§ 404.981, 416.1481.

Pursuant to 20 C.F.R. § 404.1520(a)(4) for SSDI and 20 C.F.R. § 416.920(a)(4) for SSI, an individual must satisfy a "five-step sequential evaluation process" to qualify for social security benefits on the basis of a disability. First, the applicant must not be engaged in any substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). Second, the applicant must have a severe medically determinable physical or mental impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). Third, if the applicant's impairments meet or equal one of the impairments listed in Appendix 1 of the regulation, the

applicant is disabled and eligible for benefits. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the applicant's impairments do not satisfy the third step, the applicant must satisfy two additional requirements. Fourth, the applicant's impairments must render the applicant unable to perform their prior work. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). And, fifth, the applicant must be unable, based on the applicant's impairments, age, education, and work experience, to adjust to another readily available profession. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *see* 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (defining "work" for disability determinations as only "work which exists in significant numbers either in the region where such individual lives or in several regions in the country").

The burden of proof lies with the applicant for the first four steps, but the burden shifts to the Commissioner for the fifth. *See Brault*, 683 F.3d at 445; *Bauzo v. Bowen*, 803 F.2d 917, 923 (7th Cir. 1986); *Allen v. Califano*, 613 F.2d 139, 145 (6th Cir. 1980). While the ALJ may consider evidence otherwise inadmissible in a court of law, *see* 42 U.S.C. § 405(b)(1), all of the ALJ's factual findings must be supported by substantial evidence regardless of admissibility, 42 U.S.C. § 405(g).

If an applicant satisfies the five steps, then the applicant is disabled and may be eligible for SSDI under 42 U.S.C. § 423 and for SSI under 42 U.S.C. § 1381a.[3]

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[3] This year, based on cost-of-living adjustments, SSI is $750 per month, minus certain amounts of the individual's income, 20 C.F.R. § 416.410. Soc. Sec. Admin., *SSI Federal Payment Amounts For 2018*, http://www.ssa.gov/oact/cola/SSI.html (last visited Feb. 13,

Failure on any of these steps, except for step three, renders the applicant ineligible for social security benefits on the basis of disability.

B. Factual Background

Petitioner Michael Biestek worked for most of life as a carpenter and laborer, building scaffolding on construction sites. Pet. App. 3a, 109a. In June 2005 he became unemployed, and has remained unemployed since because of lower back pain caused by a degenerative disc disease, depression, and Hepatitis C. Pet. App. 3a.

In March 2010, Mr. Bietsek applied for social security benefits, alleging that his disability commenced on October 28, 2009. Pet. App. 3a. His application was denied by the SSA and by an ALJ that reviewed his application. Pet. App. 3a. The Appeals Council denied review. Pet. App. 3a. Mr. Biestek sought district court review of the ALJ's decision. Pet. App. 3a. The district court vacated and remanded the denial of Mr. Biestek's application, finding the ALJ had failed to procure necessary medical opinions and had made an improper assumption regarding the vocational expert's testimony. Pet. App. 3a.

On remand, the ALJ denied Mr. Biestek's application for benefits from October 28, 2009, his alleged onset date, to May [redacted] 2013, finding that Mr. Biestek had "the residual functional capacity to perform sedentary work" with several limitations, and that such work was readily

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2018). The amount of an individual's SSDI benefit is based on the amount of income upon which the individual had paid Social Security taxes.

available. Pet. App. 89a-90a, 109a-110a. The ALJ found, however, that Mr. Biestek was eligible for disability benefits beginning on May [redacted] 2013, when his advanced age seriously impacted his ability to adjust to other work. Pet. App. 112a; *see* 20 C.F.R. §§ 404.1563(d), 416.963(d). In determining that Mr. Biestek could have found alternate employment from October 28, 2009, to May [redacted] 2013, the ALJ relied solely on the testimony of a vocational expert. Pet. App. 111a-112a. The expert opined that Mr. Biestek "would have been able to perform the requirements of representative sedentary unskilled occupations," such as a bench assembler, with 240,000 jobs nationally and 6,000 jobs in Southeast Michigan, and a sorter, with 120,000 jobs nationally and 1,500 jobs in Southeast Michigan. Pet. App. 111a, 116a. The expert further opined that such jobs were available to Mr. Biestek despite his additional limitations "based on her knowledge and experience of the job market in Southeastern Michigan." Pet. App. 111a; *see also* Pet. App. 117a (testifying that her estimate of jobs available to Mr. Biestek despite his additional severe limitations "is based on [her] professional experience").

Before the ALJ, Mr. Biestek questioned the accuracy of the vocational expert's opinion, and requested that the expert produce the job analyses and labor market surveys she had relied upon to reach her conclusions on each job's requirements and availability. Pet. App. 117a-119a. The vocational expert refused to provide this data in any form, citing the confidentiality of her files. Pet. App. 118-119a. Instead, she claimed her opinion could be relied upon based solely on her "professional experience" and the Department of Labor's *Dictionary of Occupational Titles*, which does not address any of

Mr. Biestek's additional limitations and which defines various types of jobs but provides no data on their current availability in regions throughout the country. *See* Pet. App. 117a. The ALJ refused to require the expert to provide the relied-upon data, even in redacted form, Pet. App. 118a-119a, and found that significant numbers of positions were available to Mr. Biestek from October 28, 2009, to May [redacted] 2013, based on the expert's testimony alone. Pet. App. 109a-110a.

Reviewing the ALJ's findings for substantial evidence, the district court affirmed. Pet. App. 33a. The court found, as a matter of law, that the ALJ was entitled to rely solely on the vocational expert's testimony to find substantial evidence of jobs available to Mr. Biestek, notwithstanding the expert's refusal to provide any of the data underlying that testimony. Pet. App. 28a-30a.

The Sixth Circuit affirmed, recognizing that it was ruling on a question over which there was "a divide . . . between the Seventh Circuit and several other circuits that have staked a position." Pet. App. 20a. Quoting the Second Circuit's observation that the Seventh Circuit's rule "has not been a popular export," Pet. App. 21a (quoting *Brault*, 683 F.3d at 449), the Sixth Circuit joined the Second and Ninth Circuits, holding that there exists no "oblig[ation for] vocational experts to provide the data and reasoning used in support of their conclusions upon request." Pet. App. 21a. *See Brault*, 683 F.3d at 449; *Bayliss*, 427 F.3d at 1217-18. *But see Donahue*, 279 F.3d at 446; *McKinnie*, 368 F.3d at 910-11.

The Sixth Circuit found that in 42 U.S.C. § 405(b)(1), "Congress specifically exempted Social Security

disability proceedings from the strictures of the Federal Rules of Evidence, allowing ALJs to consider a broader range of potentially relevant information than would be admissible in an ordinary court of law." Pet App. 21a. *See* 42 U.S.C. § 405(b)(1) ("Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure."). Yet, the Court held, requiring a vocational expert to produce the data underlying his or her opinion would "effectively import a key provision of the Federal Rules of Evidence into Social Security proceedings." Pet. App. 21a. The Sixth Circuit also rejected the Seventh Circuit's rule that vocational experts must produce the data supporting their conclusions because the Sixth Circuit found "little clarity on how to apply the *Donahue* and *McKinnie* standards." Pet. App. 22a.

The Court observed that while "vocational expert testimony that is 'conjured out of whole cloth' cannot be considered substantial evidence," here Mr. Biestek "aired his concerns to the ALJ who accepted the vocational expert's testimony over his objections." Pet. App. 22a (quoting *Donahue*, 279 F.3d at 446). The Sixth Circuit thus concluded "the ALJ's acceptance of [the vocational expert's] testimony cannot be said to have been improper." Pet. App. 23a (alteration in original) (quoting *Sias v. Sec'y of Health & Human Servs.*, 861 F.2d 475, 481 (6th Cir. 1988)).

REASONS FOR GRANTING THE WRIT

This case presents the ideal vehicle for this Court to resolve an acknowledged and entrenched conflict among the circuits on an important and frequently recurring

legal issue that arises in hundreds of thousands of social security ALJ proceedings annually. *See* SSA Data at tbl. 63. If Mr. Biestek's case had arisen in the Seventh Circuit, the vocational expert's testimony would not have constituted substantial evidence of the "other work," 20 C.F.R. § 404.1520(a)(4)(v), available to Mr. Biestek, once the vocational expert refused upon request to provide any data or analysis supporting her conclusions. Because his case arose in the Sixth Circuit—as it would were it to have arisen in the Second or Ninth Circuits—the expert's challenged testimony alone did constitute substantial evidence.

This circuit conflict has existed for over fifteen years, and further percolation is unnecessary. There is no justification for the current geographic discrepancy in how ALJs assess vocational expert testimony in the hundreds of thousands of social security benefits proceedings in which vocational experts testify annually, and this Court's review is warranted.

The petition for certiorari should be granted.

I. THERE IS AN ACKNOWLEDGED CONFLICT OF AUTHORITY ON THE QUESTION PRESENTED.

As the Sixth Circuit acknowledged in ruling against Mr. Biestek, its decision was squarely in conflict with rulings of the Seventh Circuit and in agreement with decisions from the Second and Ninth Circuits. Pet. App. 20a.

A. The Seventh Circuit Requires Vocational Experts to Produce Upon Request the Data Underlying Their Opinions Regarding "Other Work" Available to an Applicant.

In *McKinnie v. Barnhart*, 368 F.3d 907, 911 (7th Cir. 2004), a vocational expert testified that notwithstanding an applicant's disability, the applicant could perform various specific jobs, several thousand of which existed in the applicant's region. *Id.* at 909. When challenged by the applicant's lawyer to "show us how you arrived at [your] figure[s]," the expert stated that she used her "personal labor market surveys" to extrapolate the numbers from other data. Pet. App. 120a. The applicant's lawyer asked for the personal labor market surveys to be included in the record. Pet. App. 120a. Despite the expert's willingness, the ALJ found the expert need not supplement the record with the data and references she had relied upon in reaching her conclusions unless the applicant compensated the expert for her time. *See* Pet. App. 120a-121a; *McKinnie*, 368 F.3d at 909. The record was never supplemented, and based on the expert's unsupported testimony the ALJ found substantial evidence of other work available to the applicant. *McKinnie*, 368 F.3d at 909.

In vacating the ALJ's decision, the Seventh Circuit observed, "the standards by which an expert's reliability is measured may be less stringent at an administrative hearing than under the Federal Rules of Evidence." *Id.* at 910. Nonetheless, "because an ALJ's findings must be supported by substantial evidence, an ALJ may depend upon expert testimony only if the testimony is reliable." *Id.* Thus, the Seventh Circuit held "[a] vocational expert

is 'free to give a bottom line,' but the data and reasoning underlying that bottom line *must* be 'available on demand' if the claimant challenges the foundation of the vocational expert's opinions." *Id.* at 911 (quoting *Donahue*, 279 F.3d at 446) (emphasis added). Recognizing "[i]t is the Commissioner's burden at Step 5 to establish the existence of a significant number of jobs that the claimant can perform," the court found no reason an applicant "should pay a vocational expert to do the preparatory research that she should have completed prior to testifying." *Id.* "The data and reasoning underlying a vocational expert's opinions are not 'available on demand,'" as the court found they must be, "if the [applicant] must pay for them." *Id.* Because the expert had not made available the data underlying her conclusions, the Seventh Circuit found the ALJ could not rely upon those conclusions as substantial evidence on the step five inquiry and vacated and remanded the ALJ's decision. *Id.*

In so ruling, the Seventh Circuit reaffirmed the rule of its prior decision in *Donahue*, 279 F.3d at 446. There, Judge Easterbrook writing for the court observed "[e]vidence is not 'substantial' if vital testimony has been conjured out of whole cloth." *Donahue*, 279 F.3d at 446. Thus, "an expert is free to give a bottom line, provided that the underlying data and reasoning are available on demand."[4] *Id.*

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[4] In *Donahue*, the Seventh Circuit affirmed the ALJ's denial of supplemental security income because the applicant had not challenged the vocational expert's conclusions, or requested the data underlying them before the ALJ. 279 F.3d at 446-47.

B. The Second, Sixth, and Ninth Circuits Do Not Require Vocational Experts to Produce Upon Request the Data Underlying Their Opinions Regarding "Other Work" Available to an Applicant.

In the decision below, the Sixth Circuit held that substantial evidence supported the ALJ finding that other jobs were available to Mr. Biestek, based solely on a vocational expert's unsupported testimony and notwithstanding the expert's failure to provide the data—namely, personally conducted labor market surveys and job analyses—underlying that testimony when requested. Pet. App. 20a-22a, 117a-119a. That decision squarely conflicts with the rule in the Seventh Circuit, and is consistent with the rule in Second and Ninth Circuits.

In *Brault v. Social Security Administration, Commissioner*, 683 F.3d 443 (2d Cir. 2012), an applicant challenged a vocational expert's estimate of the number of jobs available to the applicant notwithstanding his disability. In providing this estimate, the expert had relied upon one source—the Labor Department's *Dictionary of Occupational Titles* ("DOT")—to identify potential jobs available to the applicant, but on a different source—*The Occupational Employment Quarterly II*—to identify the number of jobs available to the applicant in Vermont, where he lived. *Id.* at 446-47. The applicant argued that these two sources of data contained different job definitions, and thus that the expert could not opine on available jobs by merging the two. *Id.* The expert did not provide any data or analysis underlying his conclusions, and instead claimed that he

counted only "jobs . . . that I know exist." *Id.* at 447 (quotation marks omitted). The ALJ did not respond to the applicant's objections, did not demand the underlying data from which the expert based his conclusions, and instead issued a decision relying on the vocational expert's testimony and agreeing that the positions the expert had identified were available in the numbers the expert had given. *Id.*

On appeal to the Second Circuit, the applicant argued that "once [the vocational expert's] testimony had been challenged, the ALJ was *required*: . . . to grant an opportunity to inspect and challenge the proffered evidence[.]" *Id.* at 448. Recognizing that this was an issue over which there exists "a split among our sister circuits," the court criticized the Seventh Circuit for "acknowledg[ing] in *Donahue* that ALJs are not bound by the Rules of Evidence, but then turn[ing] around and requir[ing] ALJs to hew so closely to *Daubert's* principles." *Id.* at 449. Citing its own precedent, the Court also noted "the marked absence of any 'applicable regulation or decision of this Court requiring a vocational expert to identify with greater specificity the source of his figures or provide supporting documentation.'" *Id.* at 450 (quoting *Galiotti v. Astrue*, 266 F. App'x 66 (2d Cir. 2008) (summary order)).

The Second Circuit found the ALJ had considered the applicant's challenge to the vocational expert's testimony because the applicant's counsel had been afforded the opportunity on cross-examination to "explore the limitations of the . . . mapping methodology" the expert must have used to reach a conclusion despite using two inconsistent sources. *Id.* at

451. The Second Circuit clarified that it was "*not* hold[ing] that an ALJ *never* need question reliability." *Id.* at 450. Nonetheless, the Second Circuit held the ALJ could rely on only the vocational expert's testimony in finding substantial evidence of other work available to the applicant, even when the expert produced none of the data or analyses underlying his conclusions. *Id.* at 450-51.

The Sixth Circuit's decision is also consistent with the Ninth Circuit's decision in *Bayliss v. Barnhart*, 427 F.3d 1211 (9th Cir. 2005), to reject the Seventh Circuit's rule. In *Bayliss*, an applicant challenged an ALJ's reliance on a vocational expert's testimony regarding the relevant number of other jobs that existed in the national economy notwithstanding the applicant's disability. *Id.* at 1218. In rejecting this challenge, the Ninth Circuit held "[a vocational expert's] recognized expertise provides the necessary foundation for his or her testimony. Thus, no additional foundation is required." *Id.* Unlike the Seventh Circuit, therefore, which does not permit an ALJ to rely upon a vocational expert's unsupported testimony once that testimony is challenged and the data underlying it is requested, in the Ninth Circuit a vocational expert's testimony alone constitutes substantial evidence of the § 404.1520(a)(4)(v) factor.[5]

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[5] Indeed, some district courts in the Ninth Circuit have gone even further and read *Bayliss* as holding that a vocational expert's testimony is *per se* reliable because of the expert's recognized expertise, even in the face of contrary evidence. *See Early v. Colvin*, No. 3:14-CV-06015-DWC, 2015 WL 4231598, at *8 (W.D.

Finally, in an unpublished opinion, the Third Circuit indicated that it, too, was likely to reject the Seventh Circuit's rule. In *Welsh v. Commissioner Social Security*, 662 F. App'x 105 (3d Cir. 2016), the Third Circuit noted that it had not yet adopted the *Donahue* rule "with good reason." *Id.* at 109–10. Yet, because the petitioner failed to question the basis of the vocational expert's testimony, *id.* at 109, the Court never decided whether a vocational expert must provide evidence if questioned by opposing counsel or the ALJ.

* * *

Had Mr. Biestek's case arisen in the Seventh Circuit, the ALJ would not have been permitted to find substantial evidence of other work available to Mr. Biestek based solely on the vocational expert's

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Wash. July 10, 2015) (finding under *Bayliss* that even assuming applicant did not waive challenge, ALJ was entitled to rely solely on vocational expert's testimony despite applicant's contradicting evidence on number of available jobs, because the vocational expert's "recognized expertise provides the necessary foundation for his or her testimony" (quoting *Bayliss*, 427 F.3d at 1217-18)); *Merryflorian v. Astrue*, No. 12-CV-2493-IEG (DHB), 2013 WL 4783069, at *6 (S.D. Cal. Sept. 6, 2013) (holding, and summarizing unreported cases finding, that an applicant cannot challenge the validity of a vocational expert's unsupported testimony on number of available jobs, even with contradicting evidence, because a vocational expert's "recognized expertise provides the necessary foundation for his or her testimony" (quoting *Bayliss*, 427 F.3d at 1217-18). To the extent *Bayliss* holds that a vocational expert's testimony is *per se* reliable, no matter what evidence an applicant provides in response, the Ninth Circuit has taken an even more permissive approach as to what constitutes substantial evidence of other work available to an applicant pursuant to 20 C.F.R. § 404.1520(a)(4)(v). This only further demonstrates the necessity of this Court's review.

unsupported testimony once Mr. Biestek requested the data underlying that testimony. Because Mr. Biestek's case arose in the Sixth Circuit, the ALJ made exactly that finding. There is a clear and entrenched conflict of authority on this issue that has existed for over fifteen years and further percolation is unnecessary.

II. THIS CASE PRESENTS A RECURRING, IMPORTANT ISSUE THAT WARRANTS THIS COURT'S REVIEW.

More than two million individuals apply for supplemental security income on the basis of disability annually. SSA Data at tbl. 60. Each of these applications must go through the same five-step analysis for eligibility and as noted above, failure on any step except the third renders the applicant ineligible for benefits.

If an applicant reaches the fifth step, disability benefits are denied if the Commissioner of Social Security can show that other work would be available to the applicant notwithstanding the applicant's disability, and thus the benefits eligibility rises or falls based on this inquiry. Although exact numbers are unavailable, in at least hundreds of thousands of these proceedings annually, vocational experts provide testimony on the availability of other jobs. And, in the three circuits identified above, testimony bereft of any underlying data, even when challenged by an applicant, can be sufficient to satisfy the government's burden and result in a denial of benefits.

Resolution of this conflict is important because there is no logical justification—and significant unfairness—in the current heterogeneity among the circuits on the standard for accepting the testimony of vocational

experts. Moreover, as discussed below, the majority rule is wrong and can, as in Mr. Biestek's case, result in the denial of vitally needed benefits in many situations where an expert's testimony regarding other jobs available to an applicant is completely untested, and thus potentially entirely inaccurate.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THIS CONFLICT.

This case presents a strong vehicle for this Court to review the circuit split. The facts are undisputed, and the Sixth Circuit squarely ruled on the question presented. That ruling was determinative of Mr. Biestek's case and in its ruling the Sixth Circuit explicitly considered and rejected the contrary rule of the Seventh Circuit that Mr. Biestek had proposed.

Moreover, this case is a particularly strong vehicle because the facts precisely frame the question presented and highlight the circuit split. Before the ALJ, Mr. Biestek specifically requested the personal labor market surveys underlying the vocational expert's opinion, and the expert acknowledged the existence of that data but refused to provide it. Pet. App. 118a-119a. The Sixth Circuit held that the ALJ's reliance on only that testimony provided substantial evidence for the ALJ's finding. Pet. App. 22a. Similarly, in *McKinnie*, the applicant requested, and the vocational expert failed to produce, the labor market surveys upon which she relied. Pet. App. 120a-121a. In contrast to the Sixth Circuit, the Seventh Circuit held that the ALJ's reliance on only that testimony failed to provide substantial evidence for his finding. *McKinnie*, 368 F.3d at 911. Because many social security proceedings—including

before ALJs—include uncounseled applicants, the record below is rarely as clean as it is in this case, and requests for the data underlying a vocational expert's conclusions are not usually made with the precision with which they were made here.

Thus, this record, and the courts' decisions based upon it, present the ideal vehicle for review of this question.

IV. THE SIXTH CIRCUIT'S DECISION WAS INCORRECT.

Finally, the Sixth Circuit's decision merits review because it is wrong. As the Seventh Circuit recognized, the fact that the Federal Rules of Evidence are inapplicable in social security benefits proceedings is irrelevant because, regardless of the rules of evidence that apply, an ALJ's decision must be supported by "substantial evidence" to withstand judicial review. 42 U.S.C. § 405(g). *See Donahue*, 279 F.3d at 446 ("[T]he idea that experts should use reliable methods does not depend upon Rule 702 alone, and it plays a role in the administrative process because every decision must be supported by substantial evidence."). The substantial evidence standard requires "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). And, as the Seventh Circuit stressed, "because an ALJ's findings must be supported by substantial evidence, an ALJ may depend upon expert testimony only if the testimony is reliable." *McKinnie*, 368 F.3d at 910. Evidence regarding the number of jobs available to

an applicant cannot be reliable, and therefore cannot be substantial, if it "has been conjured out of whole cloth," *Donahue*, 279 F.3d at 446, or if it is not correctly derived from statistical data.

Yet, under the rule in the Sixth, Second, and Ninth Circuits a vocational expert can opine—without providing *any* supporting data—on the number of jobs available to a disability applicant. And that unsupported testimony alone can constitute "substantial evidence" to satisfy the government's burden to prove that other jobs are available to the applicant and thus that social security benefits on the basis of a disability need not be granted.

There is virtually no other area of the law where an expert's conclusions regarding data constitute "substantial evidence" of a fact when an opposing party challenges the accuracy of those conclusions but the expert refuses to supply—or cannot supply—any underlying data. Further, an individual's opinion based on her expertise alone, absent any empirical data whatsoever, does not constitute "substantial evidence" of a fact in other administrative contexts. *See, e.g.*, *CIBA Corp. v. Weinberger*, 412 U.S. 640, 642 (1973) (requiring "adequate and well-controlled investigations" before the FDA can, based on substantial evidence, determine a drug's safety (quotation marks omitted)); *Fed. Power Comm'n v. Fla. Power & Light Co.*, 404 U.S. 453, 464 (1972) (holding that "well-reasoned expert testimony—based on what is known and uncontradicted [sic] by empirical evidence" may be substantial evidence). Yet, the majority rule places social security benefits proceedings separate and apart in this respect.

Moreover, this rule is not only unfair; it is also irrational. As the Seventh Circuit observed, "[p]resumably a vocational expert establishes the foundation for her opinions," and the underlying data constitutes "the preparatory research that she should have completed prior to testifying." *McKinnie*, 368 F.3d at 911. In cases where that data actually exists—as the expert in Mr. Biestek's case claimed it did—there is simply no justification (nor do the courts adopting the majority rule provide one) for denying the applicant access to that data at least in a redacted form or in an *in camera* review, if confidentiality concerns exist. If in fact no such data exists to justify the expert's conclusions, then it is hard indeed to see how the expert's unmoored conclusions on jobs that are available to an applicant could constitute "substantial evidence" necessary to satisfy the government's burden on that point. Adopting the Seventh Circuit's rule that an expert must provide the data underlying her conclusions—even in redacted form—would impose a minimal burden on the expert or the ALJ, but would allow applicants to probe and challenge the expert's conclusions.

Contrary to the Sixth Circuit's characterization, the Seventh Circuit's *Donahue* rule does not require a *Daubert*-like hearing for every vocational expert's testimony. It merely asks that, if challenged, the vocational expert make available the data underlying the expert's opinion. *See, e.g., Britton v. Astrue*, 521 F.3d 799, 802-04 (7th Cir. 2008) (finding that substantial evidence supported ALJ's decision, where vocational expert offered upon request to provide the pages of data she relied upon and counsel instead insisted on the

whole, voluminous publication). This interpretation of 42 U.S.C. § 405(g)'s substantial evidence standard gives ALJs the flexibility Congress intended when exempting social security adjudications from the Federal Rules of Evidence, while ensuring that ALJs' decisions—and the expert conclusions upon which they rely—are supported by substantial evidence. The Sixth Circuit's decision to the contrary was wrongly decided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 21, 2018

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Michael J. Biestek,

Plaintiff-Appellant,

v. No. 17-1459

Commissioner of Social Security,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Michigan at Flint.
No. 4:16-cv-10422 – Linda V. Parker, District Judge.

Argued: October 6, 2017

Decided and Filed: December 27, 2017*

Before: CLAY, COOK, and WHITE, Circuit Judges.

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* This decision was originally filed as an unpublished opinion on December 27, 2017. The court has now designated the opinion for publication.

COUNSEL

ARGUED: Meredith E. Marcus, DALEY DISABILITY LAW, P.C., Chicago, Illinois, for Appellant. Michael L. Henry, SOCIAL SECURITY ADMINISTRATION, Boston, Massachusetts, for Appellee. **ON BRIEF:** Meredith E. Marcus, Frederick J. Daley, Jr., DALEY DISABILITY LAW, P.C., Chicago, Illinois, for Appellant. Michael L. Henry, SOCIAL SECURITY ADMINISTRATION, Boston, Massachusetts, for Appellee.

OPINION

COOK, Circuit Judge. Plaintiff-Appellant Michael J. Biestek ("Biestek") alleges that he became disabled on October 28, 2009, for purposes of receiving Disability Insurance Benefits and Supplemental Security Income under the Social Security Act. An Administrative Law Judge ("ALJ") issued a partially favorable decision finding Biestek disabled beginning May [redacted] 2013, some three-and-a-half years short of the time he claimed.

Biestek sought judicial review of the ALJ's finding of non-disability for the period between October 28, 2009, and May [redacted] 2013. The district court rejected his claims. We AFFIRM.

I. BACKGROUND

Biestek, fifty-four, worked for most of his life as a carpenter and a laborer in various construction-related roles. His work frequently entailed transporting scaffolding, panels, and other construction materials around work sites. He completed at least twelve years of education, plus one year of college, and received additional vocational training as a bricklayer and carpenter. He stopped working in June 2005, allegedly due to degenerative disc disease, Hepatitis C, and depression.

Biestek applied for Supplemental Security Income and Disability Insurance Benefits in March 2010, alleging a disability onset date of October 28, 2009. The Social Security Administration ("SSA") initially denied this application in August 2010. Biestek requested a hearing before an ALJ, the ALJ denied Biestek's application, and the Social Security Administration Appeals Council denied review. Biestek timely appealed to the district court. That court adopted a magistrate judge's report and recommendation and remanded the case to the SSA because the ALJ had not obtained necessary medical-expert testimony and did not pose a sufficiently specific hypothetical to the vocational expert.

Following a second hearing and additional opinion gathering, the ALJ issued a partially favorable decision finding Biestek disabled starting on his fiftieth birthday (May [redacted] 2013)—the point at which the Agency deems an applicant "closely approaching advanced age" and thus presumptively disabled pursuant to 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 201.14; *see also* 20 C.F.R.

§ 404.1563(d) (defining persons "closely approaching advanced age" as between ages fifty and fifty-four). The ALJ found that Biestek was "not disabled" before May [redacted] 2013, however.

Biestek again appealed to the district court. This time, though, the magistrate judge's report and recommendation found that the ALJ's decision should be affirmed in full. Rejecting Biestek's objections, the district court then adopted the report and recommendation. This timely appeal followed.

II. ANALYSIS

Biestek briefs five issues, but because he forfeited one by failing to timely raise it before the district court, just four are properly before us.[1] We will affirm the SSA's conclusions unless the ALJ applied incorrect legal standards or her findings were not supported by substantial evidence in the record. *Wright-Hines v. Comm'r of Soc. Sec.*, 597 F.3d 392, 395 (6th Cir. 2010). Substantial evidence supports a decision if "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" backs it up. *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). Thus, a decision supported by substantial

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[1] Biestek also argues that the ALJ erred by not accounting for alleged moderate limitations in his concentration, persistence, or pace. But because Biestek failed to address this issue in his objections to the magistrate judge's report and recommendation, we consider it forfeited on appeal. *Willis v. Sullivan*, 931 F.2d 390, 401 (6th Cir. 1991).

evidence must stand, even if we might decide the question differently based on the same evidence. *Wright-Hines*, 597 F.3d at 395. It is not our role to "try the case de novo, nor resolve conflicts in evidence, nor decide questions of credibility." *Walters v. Comm'r of Soc. Sec.*, 127 F.3d 525, 528 (6th Cir. 1997) (quoting *Garner v. Heckler*, 745 F.2d 383, 387 (6th Cir. 1984)).

A. Substantial Evidence Supports the ALJ's Finding that Biestek's Medical Condition Did Not "Medically Equal" the Listing

Biestek contends the ALJ incorrectly found that he did not meet or medically equal the back-pain-related impairment listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1, Pt. A1, § 1.04(A).[2] The impairment must last for at least twelve months to meet the terms of the listing. *Id.* at § 1.00(B)(2)(a). The ALJ determined Biestek did not meet or medically equal the listed impairment because Biestek "lack[ed] the requisite motor and sensory deficits, and there [was] no evidence of spinal arachnoiditis or spinal stenosis resulting in pseudoclaudication." The ALJ relied significantly on agency-appointed expert Dr. Frank L. Barnes's opinion

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[2] This listing, for "disorders of the spine," requires (in relevant part) "[e]vidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine)." 20 C.F.R. Pt. 404, Subpt. P, App. 1, Pt. A1, § 1.04(A).

that Biestek's physical condition neither met nor equaled a medical listing while assigning minimal weight to the opinions of Biestek's retained expert, Dr. Alexander J. Ghanayem.

Biestek claims that he "medically equaled" the listing because he displayed all the required criteria at one point or another during the relevant period, even if not concurrently or consistently over twelve months. He also argues that Dr. Ghanayem offered analysis and explanations superior to the allegedly flawed testimony of Dr. Barnes, so that reliance on Barnes's testimony cannot constitute "substantial evidence" in support of the ALJ's opinion.

1. The ALJ Reasonably Found Biestek Did Not "Medically Equal" the Listing

Biestek argues that "medically equaling" the listing does not require all symptoms to be present consistently for a twelve-month period, and that to impose such a requirement would erase the distinction between "meeting" and "medically equaling" a listing. He maintains that displaying different deficits at different times over the course of twelve months is enough to satisfy the duration requirement.

As the Commissioner points out, however, medical equivalency is not a refuge for claimants who show only intermittent signs of impairment. The Commissioner's own regulation makes clear that equivalency exists where a claimant's impairment "is at least equal in severity *and duration* to the criteria of any listed impairment." 20 C.F.R. § 404.1526(a) (emphasis added); *see also Kidd v. Colvin*, No. CV 115-207, 2017

WL 914061, at *4 (S.D. Ga. Feb. 2, 2017) (magistrate's report and recommendation) (finding a failure to meet the duration requirement where the claimant's back pain was only demonstrated by "a handful of abnormal findings scattered throughout the record"), *adopted in full sub nom. Kidd v. Berryhill*, No. CV 115-207, 2017 WL 901896, at *1 (S.D. Ga. Mar. 7, 2017). Medical equivalency does not relieve claimants of the need to demonstrate the long-term nature of an impairment. The Commissioner's regulation allows for variation in the number, type, or severity of the claimant's conditions, so long as the claimant's overall impairment is "at least of equal medical significance" to a listed impairment. 20 C.F.R. § 404.1526(b)(ii). The regulations make no provision, however, for claimants whose condition is reasonably found to be sporadic or intermittent.

2. The ALJ Reasonably Relied on Dr. Barnes's Testimony

Dr. Barnes noted the absence of positive straight leg-raising[3] on most examinations, and that numbness, reflex change, and atrophy were not consistently present over a twelve-month period. In Barnes's opinion, Biestek did not meet or equal any listing.

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[3] A straight-leg raising test (also called a Lasegue test) evaluates a patient's lower back pain. The patient lies on his back and his care provider raises his leg upward, keeping the knee straight. If the patient experiences pain, the test is positive (an abnormal result). *See* 2 Dan J. Tennenhouse, Attorneys Medical Deskbook § 18:4 (4th ed. 2017).

Furthermore, the ALJ noted that MRI images in the record show "only mild-to-moderate degenerative changes with no more than mild stenosis."

Biestek's expert, Dr. Ghanayem, assessed the evidence differently, concluding that Biestek more than met or medically equaled the terms of the listing. The ALJ gave "little weight" to Dr. Ghanayem's opinion, however, due to inconsistencies between Dr. Ghanayem's assessments and other objective medical evidence in the record. Dr. Ghanayem's opinion of Biestek's condition is in tension with the findings of multiple radiologists interpreting multiple MRIs over several years.

Additionally, we note other evidence showing Biestek had, at best, inconsistent back issues during the period he was under the care of treating physician Dr. Howard Wright. Some appointment notes do not reference back pain, only reporting Biestek as having "normal gait and station," while others only a short time later mention some pain.

Dr. Ghanayem also attempted to explain the inconsistent straight-leg raising test results. According to Dr. Ghanayem, if the underlying nerve condition becomes chronic and persists for a significant period, the affected nerves can become so damaged and desensitized that a person can pass the test. Dr. Barnes presented an alternative explanation: in some cases, a patient's spinal injuries heal by themselves, resulting in increased mobility sufficient to pass the straight- leg raising test.

Biestek argues that the ALJ inappropriately credited Dr. Barnes's testimony over Dr. Ghanayem's

opinions. But just because Dr. Ghanayem offered explanations that could reconcile elements of the objective medical record with Biestek's claims does not mean that the ALJ was required to accept those explanations. The ALJ faced dueling opinions from two highly qualified medical experts and found Dr. Barnes's testimony more credible after assessing how well his testimony fit with the objective medical record—a determination she was fully empowered to make. *See Crum v. Sullivan*, 921 F.2d 642, 644 (2d Cir. 1990) ("The [Commissioner], and not the court, is charged with the duty to weigh the evidence, to resolve material conflicts in the testimony, and to determine the case accordingly."). The ALJ based her decision on substantial evidence.

B. The ALJ Acceptably Evaluated Medical Opinion Evidence

Next, Biestek contends that the ALJ failed to properly weigh opinion evidence from two medical experts, Drs. Wright and Barnes.

1. Dr. Wright's Opinions

Dr. Wright saw Biestek frequently between October 2012 and April 2013, and filled out a residual functional capacity ("RFC") questionnaire detailing Biestek's condition in July 2015. Biestek argues that the ALJ erred in not according controlling weight to any of Dr. Wright's assessments.

An ALJ is required to give controlling weight to a treating physician's opinion, so long as that opinion is supported by clinical and laboratory diagnostic evidence not inconsistent with other substantial evidence in the

record. 20 C.F.R. § 404.1527(c)(2); *see also Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 544 (6th Cir. 2004). But if the ALJ concludes that a treating source's medical opinion is not entitled to controlling weight, she must weigh the opinion in light of several factors. *See* 20 C.F.R. § 404.1527(c) (listing factors). The ALJ need not perform an exhaustive, step-by-step analysis of each factor; she need only provide "good reasons" for both her decision not to afford the physician's opinion controlling weight and for her ultimate weighing of the opinion. *Francis v. Comm'r of Soc. Sec.*, 414 F. App'x 802, 804–05 (6th Cir. 2011); *Blakley v. Comm'r of Soc. Sec.*, 581 F.3d 399, 406–07 (6th Cir. 2009); 20 C.F.R. § 404.1527(c)(2).

Dr. Wright provided three opinions on Biestek's condition. Two are reports to the Michigan Department of Human Services from April and October 2013. The third is a residual functional capacity questionnaire created for Biestek's present disability application, from July 2015.

The ALJ declined to give any of Dr. Wright's opinions controlling weight and instead assigned them minimal weight. The ALJ discounted the July 2015 opinion entirely, noting that by then Dr. Wright had not seen Biestek for over two years. Additionally, the ALJ stated that Dr. Wright's earlier opinions were not supported by the objective medical record evidence. She pointed to the "numerous MRI studies [which] showed no more than mild-to-moderate degenerative findings" as the "most notabl[e]" example, but did not specifically refer to any additional evidence in the record to support her reasoning.

Biestek claims the ALJ gave Dr. Wright's opinions short shrift. At a minimum, he asserts the ALJ should have afforded Dr. Wright's 2013 opinions the substantial weight generally accorded a treating physician's opinions. The magistrate judge's report and recommendation agrees that Dr. Wright was one of Biestek's treating physicians during this period. Biestek states that MRI evidence was "the only reason offered by the ALJ to reject Dr. Wright's assessment," and that the ALJ ignored substantial evidence in the record demonstrating Biestek's efforts to alleviate significant pain. Additionally, Biestek argues that the ALJ's reliance on the MRI findings is misplaced in light of Dr. Ghanayem's alternative explanation of the MRI imaging as consistent with Biestek's alleged impairments.

The ALJ had adequate reason to assign minimal weight to Dr. Wright's July 2015 questionnaire. By that time, Dr. Wright had not provided Biestek with medical care for over two years, clearly indicating that Dr. Wright and Biestek were no longer in a treatment relationship. *See* 20 C.F.R. § 404.1527(c)(2)(i)–(ii).

As for Dr. Wright's earlier opinions, while they may be somewhat in accord with other evidence, they are nonetheless inconsistent with prior MRI results showing only mild-to- moderate degeneration. Biestek alleges that the ALJ's failure to elaborate on her specific rationale for discounting Dr. Wright's 2013 opinions beyond referencing the MRI evidence amounts to a failure to provide "good reasons," warranting reversal. But the MRIs were only the "most notabl[e]" evidence the ALJ relied on; other evidence in the record also supports the ALJ's decision. We may consider this

evidence, even if the ALJ failed to mention it. *Heston v. Comm'r of Soc. Sec.*, 245 F.3d 528, 535 (6th Cir. 2001) ("Judicial review of the Secretary's findings must be based on the record as a whole. Both the court of appeals and the district court may look to any evidence in the record, regardless of whether it has been cited [in prior SSA proceedings].").[4]

Here, the ALJ provided a rationale and referred to particular evidence in the record. The point of the "good reasons" rule is to permit meaningful review of the ALJ's decision and to ensure that a claimant is not "bewildered" when an administrative bureaucracy tells him that he is not disabled. Wilson, 378 F.3d at 544 (quoting *Snell v. Apfel*, 177 F.3d 128, 134 (2d Cir. 1999)). There are no such problems in this case. In addition to the MRIs, other record evidence supports the ALJ's conclusion, even if she referenced such evidence in a more general way.

As the Commissioner points out, the examination notes from Biestek's various visits to Dr. Wright during the six-month period when Dr. Wright was Biestek's

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[4] Other Sixth Circuit cases finding that an ALJ failed to provide "good reasons" where the ALJ did not cite material in the record that could have supported the ALJ's decision are distinguishable. In *Wilson*, the ALJ offered only a summary rejection of the opinion of the claimant's treating physician, with no analysis or support whatsoever. 378 F.3d at 545–46. And in *Rogers v. Commissioner of Social Security*, the ALJ dismissed the reports of multiple treating physicians based on evidence that could not reasonably outweigh the evidence proffered by the treating physicians. 486 F.3d 234, 243–44 (6th Cir. 2007).

treating physician provide some of the most notable evidence apart from the MRIs. There is little consistency regarding the back pain alleged. The first report describes Biestek as possessing "normal gait and station," and makes no mention of any back pain issues. The next two exams identified back pain as an issue, but no back pain is reported in the following three exams. Back pain then re-emerges on the final set of examination notes. These exam notes are difficult to reconcile with the stark portrait of Biestek's condition that Dr. Wright painted in the two 2013 medical examination reports.

Substantial evidence supported the ALJ's decision, and the ALJ provided a sufficient rationale. "No purpose would be served by remanding for the ALJ to explicitly address the shortcomings of [Dr. Wright's] opinion and the evidence and methods underlying it." *Kornecky v. Comm'r of Soc. Sec.*, 167 F. App'x 496, 507 (6th Cir. 2006).

2. Dr. Barnes's Opinion

a. Restriction on Bending at the Waist and Lifting Weight

Dr. Barnes testified that Biestek could occasionally squat and pick up objects weighing up to ten pounds, but that he would not be able to bend at the waist to do so. The ALJ gave this portion of Dr. Barnes's testimony "great weight," but did not incorporate a specific restriction on bending at the waist to lift up to ten pounds into her RFC analysis or into a hypothetical posed to the vocational expert. Biestek contends that, as a result, the hypothetical "did not fairly portray

Biestek's limitations as supported by the objective evidence and the ultimate findings by the ALJ," an error that "cannot be deemed harmless" because the ALJ specifically granted this portion of Barnes's testimony great weight.

The ALJ actually did incorporate a restriction on "occasional stooping," however. The Agency defines "stooping" as "bending the body downward and forward by bending the spine at the waist." SSR 83-14, 1983 WL 31254, at *2 (Jan. 1, 1983). Biestek replies that the ALJ's reference to "occasional stooping" conflicts with Dr. Barnes's total prohibition on bending at the waist. But Biestek is mistaken: Dr. Barnes did not impose a restriction on all bending at the waist. He only opined that Biestek could not bend at the waist and lift weight. The ALJ not only incorporated a limit on weight lifting into her hypothetical, she was even more restrictive than Dr. Barnes. The ALJ asked the vocational expert if jobs would be available for someone who "could not lift more than five pounds at a time." Overall, the ALJ adequately addressed the ultimate issue—Biestek's ability to lift up to ten pounds of weight.

Biestek also claims that because the SSA has itself held that some stooping is required to do most work, the ALJ should have sought further clarification on the impact of stooping. The vocational expert proposed two jobs—bench (final) assembler and nut sorter—from the *Dictionary of Occupational Titles* ("DOT") that the ALJ incorporated into her RFC analysis. But neither of these jobs requires any stooping at all. DOT § 713.687-018, 1991 WL 679271 ("Stooping:

Not Present – Activity or condition does not exist."); *see also* DOT § 521.687-086, 1991 WL 674226 (same).

b. Exertion of Force

Biestek also complains that according to the DOT, the bench assembler and nut sorter jobs may have required Biestek to "exert[] up to 10 pounds of force occasionally[5] . . . and/or a negligible amount of force frequently[6] to lift, carry, push, pull, or otherwise move objects," in violation of Dr. Barnes's prohibition on lifting ten pounds from the waist. DOT § 713.687-018, 1991 WL 679271 (final assembler); DOT § 521.687-086, 1991 WL 674226 (nut sorter). Yet nothing in the DOT indicates that such exertion requires lifting objects from ground level. As the Commissioner points out, Biestek could have exerted the necessary force in other ways, such as while seated or while working with objects at table height.

C. The ALJ Acceptably Assessed Biestek's Credibility

The ALJ described the various treatments Biestek has received over the years as "relatively effective in controlling his symptoms." The efficacy of these treatments diminished Biestek's credibility. The

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[5] The DOT defines "occasionally" as an "activity or condition exist[ing] up to 1/3 of the time." DOT § 713.687-018, 1991 WL 679271; *see also* DOT § 521.687-086, 1991 WL 674226 (same).

[6] "Frequently" is defined as an "activity or condition exist[ing] from 1/3 to 2/3 of the time." DOT § 713.687-018, 1991 WL 679271; *see also* DOT § 521.687-086, 1991 WL 674226 (same).

ALJ also noted that, throughout the record, Biestek reported engaging in a variety of daily activities suggestive of physical capacity to perform at least some sedentary work. Further, the ALJ discussed Biestek's history of non-compliance with his treatment regimen, citing numerous examples of Biestek cancelling or no-showing his medical appointments and his failure to take many of his medications as prescribed. These findings factored into the ALJ's RFC assessment.

Biestek takes issue with each of these alleged faults in his credibility, and additionally charges that the opinions of Drs. Barnes and Ghanayem should have enhanced his credibility. His task is especially difficult: while an ALJ's credibility determinations must be supported by substantial evidence, we accord them special deference. *Walters v. Comm'r of Soc. Sec.*, 127 F.3d 525, 531 (6th Cir. 1997). Given this standard, we cannot say the ALJ erred.

1. Symptom Control

The ALJ cited Biestek's favorable reaction to Demerol, as well as nerve blocks, physical therapy, and back injections as examples of treatments that provided Biestek relief. Biestek alleges that the ALJ wrongly characterized these treatments as permanently "controlling" his pain rather than granting temporary respite. There is certainly record evidence showing that these measures did not completely negate Biestek's pain, and that in some cases treatment benefits did not persist for an extended period. But the ALJ never characterized Biestek's pain as permanently and comprehensively mitigated, instead describing the various treatments Biestek received as "relative[ly]

effective[]." Moreover, she acknowledged the pain Biestek continued to endure by restricting his RFC to a narrow range of sedentary work with a variety of accommodations.

2. Daily Activities Considered

The ALJ noted that, at various times, Biestek said he engaged in a range of activities indicative of his RFC. For example, Biestek reported reading the newspaper, preparing simple meals, visiting his son at least twice a week, driving, doing laundry, shopping, cashing checks, providing childcare, watching television, running errands, playing video games, and making appointments.

Biestek objects to the ALJ's characterization of these activities, noting that he could do several of them from any position, including reading the newspaper, making appointments, and watching TV. He disputes the ALJ's assertion that he participated in childcare as Biestek's son was seventeen years old at the time of the 2015 hearing, making it unclear what "childcare" he could be engaged in. He also attempts to add color to several of the other tasks. He describes driving a car as a rare event, perhaps only occurring once a month. He says he confines his meal preparation to the microwave, does the laundry just once every two to three weeks, and only goes to the grocery store approximately once a month (and that even at the store, he has had to lie down in the aisle to relieve bouts of pain).

While Biestek's ability to perform many of these activities is definitely limited, the ALJ also cited other activities much more obviously at odds with his claims of

debilitating pain. For example, once Biestek started taking Vicodin, his quality of life improved such that he was able to exercise and play football with his son. Overall, the ALJ based her conclusions on a reasonable interpretation of the record.

3. Non-Compliance with Treatment Regimen

The ALJ also noted that Biestek has been non-compliant with his prescribed treatments, undercutting his testimony concerning the severity of his condition. In particular, the ALJ pointed to Biestek's repeated no-shows and cancellations for his medical appointments. Additionally, the ALJ referred to Biestek's admitted habit of selectively taking his prescribed medication. He took his pain medication "once in a while as needed." Other medications reveal even more problematic usage patterns. His care provider noted that Biestek stopped taking Wellbutrin (an antidepressant) both because it made him feel "weird," and because "he does not believe much in medication so that is why he does not take it." The care provider also noted that Biestek "reports he does not tell Gianina Cristiu, NP about not taking medication because he does not want to hurt his chances of obtaining SSI." While adverse side effects are a reasonable excuse for an applicant to interrupt a prescribed treatment regimen, *see* SSR 16-3P, 2016 WL 1119029, at *9 (Mar. 16, 2016), the other rationales Biestek supplied for not taking certain medications display a pattern of behavior the ALJ reasonably interpreted as undermining Biestek's credibility.

4. Testimony of Drs. Barnes and Ghanayem

Biestek further contends that because Drs. Barnes and Ghanayem concurred that Biestek's subjective statements were "entirely consistent with his pathology," the ALJ erred in failing to address this favorable credibility evidence. But the ALJ had significant reasons for discounting Dr. Ghanayem's testimony, and Dr. Barnes testified that Biestek could tolerate a range of sedentary work. The ALJ's failure to respond to these opinions does not deprive her decision of the support of substantial evidence.

5. The ALJ's Use of Evidence from After Biestek's Disability Date

Some of the evidence discussed by the ALJ postdates May [redacted] 2013, when the ALJ found Biestek disabled upon his fiftieth birthday. For example, the ALJ referenced a July 23, 2013, report by Edward Czarnecki, Ph.D., indicating that Biestek "could perform simple, rote, repetitive unskilled work." Citing no authority, Biestek claims that it was unfair to point to evidence after Biestek's disability date to impugn his credibility before that time. This is a flawed argument. Nothing about Biestek's substantive medical condition changed on May [redacted] 2013; he simply turned fifty years old, thereby creating an administrative presumption that he was disabled. 20 C.F.R. Part 404, Subpt. P, App. 2, § 201.00(g). Evidence from after his formal disability date is as relevant to discerning Biestek's credibility as evidence predating it.

D. The ALJ Did Not Err in Refusing to Require the Vocational Expert to Provide Specific Data in Support of Her Opinions

Finally, Biestek argues that the ALJ erred by refusing to require the vocational expert to produce data or other documentation to support her opinions regarding the work available to Biestek. Instead, the vocational expert based her testimony on the *Dictionary of Occupational Titles* and her "professional experience," gained from talking with employers and conducting job analyses. When Biestek's counsel requested the vocational expert produce underlying data or analyses in support of her statements, she refused, citing the confidentiality of her files, and the ALJ declined to require her to produce such information, even in a redacted format.

Biestek alleges reversible error because little substantiates the reliability of the vocational expert's testimony other than her word. Biestek argues such testimony falls short of "substantial evidence."

This court has not yet squarely addressed the extent to which vocational experts must produce underlying data in support of their opinions. There is a divide, however, between the Seventh Circuit and several other circuits that have staked a position. The Seventh Circuit adopted a rigorous approach in a pair of cases, *Donahue v. Barnhart*, 279 F.3d 441 (7th Cir. 2002), and *McKinnie v. Barnhart*, 368 F.3d 907 (7th Cir. 2004), incorporating the essence, if not the explicit requirements, of Federal Rule of Evidence 702 into the administrative adjudicative process as applied to vocational expert testimony. *See McKinnie*, 368 F.3d at

910–11. Expressing fear that vocational expert testimony could be "conjured out of whole cloth," *Donahue*, 279 F.3d at 446, the Seventh Circuit obliges vocational experts to provide the data and reasoning used in support of their conclusions upon request, *McKinnie*, 368 F.3d at 910–11. Biestek would like us to establish a similar rule for the Sixth Circuit.

But the Seventh Circuit's rule "has not been a popular export." *Brault v. Comm'r of Soc. Sec.*, 683 F.3d 443, 449 (2d Cir. 2012). Congress specifically exempted Social Security disability proceedings from the strictures of the Federal Rules of Evidence, allowing ALJs to consider a broader range of potentially relevant information than would be admissible in an ordinary court of law. 42 U.S.C. § 405(b)(1) ("Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure."). Yet despite Congress's explicit command, *Donahue* and *McKinnie* effectively import a key provision of the Federal Rules of Evidence into Social Security proceedings. As the Second Circuit noted, "[i]t is unclear . . . why the Seventh Circuit would acknowledge in Donahue that ALJs are not bound by the Rules of Evidence, but then turn around and require ALJs to hew so closely to [them]." *Brault*, 683 F.3d at 449. Other courts of appeals have followed the Second Circuit's lead. *See Welsh v. Comm'r of Soc. Sec.*, 662 F. App'x 105, 109–10 (3d Cir. 2016) (rejecting the Seventh Circuit approach due to conflict with 42 U.S.C. § 405(b)(1)); *see also Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005) ("An ALJ may take administrative notice of any reliable job information,

including information provided by a [vocational expert]. A [vocational expert]'s recognized expertise provides the necessary foundation for his or her testimony. Thus, no additional foundation is required." (internal citation omitted)).

Furthermore, there is little clarity on how to apply the *Donahue* and *McKinnie* standards. The Seventh Circuit required the Commissioner to implement an evidentiary rule "similar though not necessarily identical to that of Rule 702," but it is unclear what, precisely, such a rule would look like. *Donahue*, 279 F.3d at 446.

While it is undoubtedly true that vocational expert testimony that is "conjured out of whole cloth" cannot be considered substantial evidence, *see id.*, the Commissioner rightly points out that "guarding against baseless testimony is very different" from incorporating the stringent evidentiary requirements embodied in the Federal Rules of Evidence. Moreover, Biestek aired his concerns to the ALJ, who accepted the vocational expert's testimony over his objections. There is "no reason to suppose that the ALJ did not carefully weigh the credibility of witnesses who testified, and the ALJ's acceptance of [the vocational expert's] testimony cannot be said to have been improper." *Sias v. Sec'y of Health & Human Servs.*, 861 F.2d 475, 481 (6th Cir. 1988). Ultimately, responsibility for weighing the credibility of witnesses belongs to the ALJ, who in this case acceptably fulfilled that obligation.

III. CONCLUSION

For these reasons, we AFFIRM the district court's decision.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-1459

FILED
December 27, 2017
DEBORAH S. HUNT, Clerk

MICHAEL J. BIESTEK,
Plaintiff - Appellant,

v.

COMMISSIONER OF SOCIAL SECURITY,
Defendant - Appellee.

Before: CLAY, COOK, and WHITE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Flint.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

**ENTERED BY ORDER OF
THE COURT**

/s/
Deborah S. Hunt, Clerk

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL J. BIESTEK,

Plaintiff,

v.

Civil Case No. 16-1010422
Honorable Linda V. Parker

NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY

Defendant.

OPINION AND ORDER (1) ADOPTING MAGISTRATE JUDGE'S FEBRUARY 24, 2017 REPORT AND RECOMMENDATION [ECF NO. 28]; (2) DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [ECF NO. 22]; (3) GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [ECF NO. 23]; (4) GRANTING DEFENDANT'S EX PARTE MOTION FOR LEAVE TO FILE EXCESS PAGES [ECF NO. 30] AND (5) GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE REPLY TO RESPONSE TO OBJECTIONS [ECF NO. 32]

On February 5, 2016, Plaintiff filed this lawsuit challenging Defendant's final decision denying his application for benefits under the Social Security Act. (ECF No. 1.) On February 12, 2016, the matter was referred to Magistrate Judge Mona K. Majzoub for all pretrial proceedings, including a hearing and determination of all non-dispositive matters pursuant to 28 U.S.C. § 636(b)(1)(A) and/or a report and recommendation ("R&R") on all dispositive matters pursuant to 28 U.S.C. § 636(b)(1)(B).[1] (ECF No. 13.) The parties subsequently filed cross- motions for summary judgment. (ECF Nos. 22, 23.)

I. Background

On February 24, 2017, Magistrate Judge Majzoub issued her R&R in which she recommends that this Court deny Plaintiff's motion, grant Defendant's motion, and affirm Defendant's decision finding Plaintiff not disabled under the Social Security Act. (ECF No. 28.) In her thorough analysis, Magistrate Judge Majzoub first rejects Plaintiff's argument that the administrative law judge ("ALJ") erred in determining that Plaintiff's impairments do not meet or medically equal Listing 1.04. (*Id.* at Pg ID 2195.) Magistrate Judge Majzoub next declines Plaintiff's argument that the ALJ improperly evaluated the medical opinion evidence. (*Id.* at Pg ID 2199.) Magistrate Judge Majzoub dismisses Plaintiff's third argument that the ALJ failed to adequately account for Plaintiff's limitations in concentration, persistence, or pace. (*Id.* at Pg ID 2208.) The magistrate

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[1] This matter was first referred to Magistrate Judge R. Steven Whalen on February 8, 2016. (ECF No. 5.)

judge also deferred to the ALJ's determinations that Plaintiff's statements were not entirely credible and that the statements made by Plaintiff's mother should be given little weight. (*Id.* at Pg ID 2215). Lastly, Magistrate Judge Majzoub rejected Plaintiff's contention that the ALJ's step-five determination is not supported by substantial evidence. (*Id.*)

Magistrate Judge Majzoub concludes by advising the parties that they may object to and seek review of the R&R within fourteen days of service upon them. (*Id* at 2218.) She further specifically advises the parties that "[f]ailure to file specific objections constitutes a waiver of any further right to appeal." (*Id.*) Plaintiff filed objections on March 10, 2017. (ECF No. 29.) Defendant responded to Plaintiff's objections on March 21, 2017.[2] (ECF No. 31.)

II. Standard of Review

When objections are filed to a magistrate judge's R&R on a dispositive matter, the Court "make[s] a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The Court, however, "is not required to articulate all of the reasons it rejects a party's objections." *Thomas v. Halter*, 131 F. Supp. 2d 942, 944 (E.D. Mich. 2001) (citations omitted). A party's failure to file objections to

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[2] Defendant filed an ex parte motion requesting leave to file excess pages in their response to Plaintiff's objections. (ECF No. 30.) The Court grants Defendant's motion.

certain conclusions of the report and recommendation waives any further right to appeal on those issues. *See Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Likewise, the failure to object to certain conclusions in the magistrate judge's report releases the Court from its duty to independently review those issues. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985).

III. Applicable Law & Analysis

A. Objection 1

In Plaintiff's first objection, he reiterates the argument asserted in his summary judgment motion that the ALJ's step-five determination is not supported by substantial evidence. (ECF No. 22 at Pg ID 2129.) In particular, Plaintiff argues that the testimony of the vocational expert ("VE") was not supported by substantial evidence because the VE based her testimony on her experience. (*Id.* at Pg ID 2130.) As Magistrate Judge Majzoub notes, the VE based her testimony "on her eleven-year experience as a vocational rehabilitation consultant, which included talking with employers, performing on-the-job analysis, and conducting her own individual labor market surveys." (ECF No. 28 at Pg ID 2215.) At the end of VE's testimony, counsel for Plaintiff requested evidence of VE's experience. (*Id.*) The VE testified that it would require revealing patient's private confidential files; therefore, the ALJ determined that she would not require the VE to produce those files. (*Id.*)

Plaintiff contends that the VE was required to provide support for her testimony, relying on a standard

articulated by the Seventh Circuit in *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002). In *Donahue*, the Seventh Circuit stated that:

> If the basis of the vocational expert's conclusions is questioned at the hearing, however, then the ALJ should make an inquiry (similar though not necessarily identical to that of Rule 702) to find out whether the purported expert's conclusions are reliable. Social Security Ruling 00–4p, promulgated in December 2000 (and thus not directly applicable to this case), is to much the same effect. This ruling requires the ALJ to "[e]xplain [in the] determination or decision how any conflict [with the Dictionary] that has been identified was resolved." (Emphasis added.) The ruling requires an explanation only if the discrepancy was "identified"—that is, if the claimant (or the ALJ on his behalf) noticed the conflict and asked for substantiation.

Donahue, 279 F.3d at 446-47. The Sixth Circuit has not adopted this standard. *See Masters v. Astrue*, No. 07-123, 2008 WL 4082965 (E.D. Ky. Aug. 29, 2008) (rejecting Seventh Circuit standard requiring remand due to failure to inquire into reliability because "reliability is a factor only in the Sixth Circuit"). Plaintiff re- asserts his summary judgment argument that this Court should rely on *Donahue* although it has not been expressly

adopted by the Sixth Circuit. This Court declines to do so.

B. Objection 2

Plaintiff next argues that the magistrate judge erred when she did not apply SSR 16-3p retroactively. (ECF No. 29 at Pg ID 2227.) SSR 16-3p, which went into effect on March 28, 2016, supersedes SSR 96-7p. *See* SSR 16-3p, 2016 WL 1119029 at *1; 2016 WL 1237954 (amending the effective date). SSR 16-3p provides guidance on how the Social Security Administration should "evaluate statements regarding the intensity, persistence, and limiting effects of symptoms in disability claims[.] SSR 16-3p, 2016 WL 1119029 at *1. Because SSR 16-3p went into effect after the ALJ's decision, Magistrate Judge Majzoub complied with its precursor, SSR 96-7p. (ECF No. 28 at Pg ID 2211.) Plaintiff contends that Magistrate Judge Majzoub should have applied SSR 16-3p retroactively. (ECF No. 29 at Pg ID 2227.)

Plaintiff does not provide any binding authority to support its claim that the ruling should be applied retroactively. Further, as Defendant notes, Plaintiff did not raise an argument to apply SSR 16-3p retroactively in his initial brief and has thus waived the argument. *See Emmons v. Comm'r of Soc. Sec.*, No. 12-15235, 2014 WL 1304936 at *1 (E.D. Mich. Feb. 13, 2014) (citing *United States v. Jerkins*, 871 F.2d 598, 601 (6th Cir. 1989)).

C. Objection 3

Next, Plaintiff argues that Magistrate Judge Majzoub erred in evaluating the opinion evidence. (ECF No. 29 at Pg ID 2234.) First, Plaintiff notes that the

magistrate judge found that Dr. Wright's opinion was inconsistent with objective evidence. (*Id.*) Plaintiff mischaracterizes the magistrate judge's opinion. Magistrate Judge Majzoub stated that it would be inconsistent to state that Dr. Wright had an "ongoing treatment relationship" with Plaintiff pursuant to the requirement in 20 C.F.R. 1502. (ECF No. 28 at Pg ID 2202.) Magistrate Judge Majzoub's R&R makes clear that Dr. Wright would not qualify as a treating physician pursuant to the statute because he had not treated Plaintiff for over two years. (*Id.*)

Plaintiff also contends that Magistrate Judge Majzoub is incorrect with her analysis of Dr. Barnes' assessment. Plaintiff states that "Dr. Barnes specifically stated that he did not believe Plaintiff could even occasionally bend at the waist and the ALJ so found." (ECF No. 29 at Pg ID 2237.) However, Plaintiff's citations do not support that assertion. In fact, Plaintiff cites to the following:

> At the second hearing, Dr. Barnes opined the claimant could occasionally lift 10 pounds of weight and frequently lift 5 pounds of weight; sit for 8 hours of the day, a couple hours at a time; stand or walk for 2-4 hours, in increments of about a half hour at a time before having to sit down for about 10 minutes; and could squat to pick up 10 pounds **but not bend at the waist to do so.**"

(ECF No. 17-9 at Pg ID 801-02.) (emphasis added). Plaintiff also cites to the testimony of Dr. Barnes, where the doctor states that Plaintiff "could probably squat

down to pick up ten pounds occasionally, but I don't think he would be able to bend over at the waist (INAUDIBLE) occasionally." (*Id.* at Pg ID 973.) His testimony was in reference to Plaintiff's ability to lift certain weights. An interpretation that Dr. Barnes meant Plaintiff could not bend over at the waist to lift certain weights is consistent with Dr. Barnes' testimony at the second hearing.

D. Objections 4 and 5

Plaintiff's fourth objection states that the magistrate judge erred in determining that Plaintiff's impairments did not meet or medically equal Listing 1.04. (ECF No. 29 at Pg ID 2238.) The fifth objection argues that Plaintiff was denied his right to due process when the ALJ denied his request to allow Dr. Ghanayem appear as a rebuttal witness. (*Id.* at Pg ID 2243.)

To properly object to the R&R, Plaintiff must do more than merely restate the arguments set forth in his summary judgment motion. *See Owens v. Comm'r of Soc. Sec.*, 1:13-47, 2013 WL 1304470, at *3 (W.D. Mich. Mar. 28, 2013) (indicating that the "Court is not obligated to address objections [which are merely recitations of the identical arguments made before the magistrate judge] because the objections fail to identify the specific errors in the magistrate judge's proposed recommendations") (emphasis in original); *see also Camardo v. Gen. Motors Hourly-Rate Emps. Pension Plan*, 806 F. Supp. 380, 382 (W.D.N.Y. 1992) (recitations of nearly identical arguments are insufficient as objections and constitute an improper "second bite at the apple"); *Nickelson v. Warden*, No. 1:11 - cv-334, 2012 WL 700827, at *4 (S.D. Ohio Mar. 1, 2012) ("[O]bjections

to magistrate judges' reports and recommendations are not meant to be simply a vehicle to rehash arguments set forth in the petition."). In both the fourth and fifth objections, Plaintiff re-asserts the arguments stated in his summary judgment motion to support his claims of error in the ALJ's analysis without identifying how Magistrate Judge Majzoub erred in evaluating those arguments. (ECF No. 29 at Pg ID 2238, 2243.) For the reasons Magistrate Judge Majzoub provided in her R&R, Plaintiff's arguments are without merit.

For these reasons, the Court rejects Plaintiff's objections to Magistrate Judge Majzoub's February 24, 2017 R&R and adopts the recommendations in the R&R.

Accordingly,

IT IS ORDERED that Plaintiff's motion for summary judgment (ECF No. 22) is **DENIED**;

IT IS FURTHER ORDERED that Defendant's motion for summary judgment (ECF No. 23) is **GRANTED**;

IT IS FURTHER ORDERED that Defendant's ex parte motion for leave to file excess pages (ECF No. 30) is **GRANTED**;

IT IS FURTHER ORDERED that Plaintiff's motion for leave to file reply to Defendant's response to objections (ECF No. 32) is **GRANTED**;

IT IS FURTHER ORDERED that Defendant's decision denying Plaintiff's application for benefits under the Social Security Act is **AFFIRMED**.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: March 30, 2017

I hereby certify that a copy of the foregoing document was mailed to counsel of record and/or pro se parties on this date, March 30, 2017, by electronic and/or U.S. First Class mail.

s/ Richard Loury
Case Manager

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHEAL J. BIESTEK,

Plaintiff,

CIVIL ACTION NO. 16-CV-10422

v.

DISTRICT JUDGE LINDA V. PARKER

COMMISSIONER OF SOCIAL SECURITY

Defendant.

MAGISTRATE JUDGE MONA K. MAJZOUB

REPORT AND RECOMMENDATION

Plaintiff Michael J. Biestek seeks judicial review of Defendant Commissioner of Social Security's determination that he is not entitled to social security benefits for his physical and mental impairments under 42 U.S.C. § 405(g). (Docket no. 1.) Before the Court are Plaintiff's Motion for Summary Judgment (docket no. 22) and Defendant's Motion for Summary Judgment (docket no. 23). Plaintiff has also filed a reply brief in support of his Motion for Summary Judgment. (Docket no. 25.) The motions have been referred to the undersigned for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). (Docket no. 13.) The Court has reviewed the pleadings, dispenses with a hearing pursuant to Eastern District of Michigan Local Rule 7.1(f)(2), and issues this Report and Recommendation.

I. RECOMMENDATION

For the reasons that follow, it is recommended that Plaintiff's Motion for Summary Judgment (docket no. 22) be **DENIED** and Defendant's Motion for Summary Judgment (docket no. 23) be **GRANTED**.

II. PROCEDURAL HISTORY

The undersigned adopts and incorporates by reference the procedural history of this matter set forth in the ALJ's decision. (TR 721-22.)

III. HEARING TESTIMONY AND MEDICAL EVIDENCE

In his brief, Plaintiff sets forth the procedural history of this matter and a brief statement of the case, informing that his medical records are incorporated by reference in the argument portion of his brief. (Docket no. 22 at 2-3.) The ALJ summarized Plaintiff's hearing testimony, Plaintiff's medical record, and the vocational expert's (VE's) testimony in her decision. (TR 724-38.) Defendant adopts the ALJ's recitation of the facts. (Docket no. 23 at 5.) There are no material inconsistencies between the ALJ's summary of the facts and the record; therefore, the undersigned will incorporate the summary by reference. Additionally, the undersigned has conducted an independent review of Plaintiff's medical record and the hearing transcript and will include comments and citations as necessary throughout this Report and Recommendation.

IV. ADMINISTRATIVE LAW JUDGE'S DETERMINATION

The ALJ found that Plaintiff met the insured status requirements of the Social Security Act through December 31, 2010, and that he had not engaged in substantial gainful activity since the alleged onset date. (TR 724.) The ALJ also found that Plaintiff suffered from the following severe impairments: degenerative disc disease, hepatitis C, asthma, and depression, but his impairments did not meet or medically equal the severity of an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (TR 724-27.) The ALJ then found that Plaintiff had the following RFC:

> [C]laimant has the residual functional capacity to perform sedentary work as defined in 20 CFR 404.1567(a) and 416.967(a) except [he] requires work in a relatively clean air work environment, such as no fumes, gases, concentrated dust or other pollutants; no climbing of ladders, ropes, or scaffolds; no climbing of ramps or stairs; no crawling; occasional stooping, crouching or kneeling; occasional flexion, extension, or rotation of the neck; no operation at hazardous heights or around dangerous machinery; no operation in temperature extremes; no work in food service or medical assistance areas; requires a sit/stand option at will, but not to exceed 30 minutes at a time in either position; is limited to simple, routine tasks such as those jobs at the SVP 1 or 2 level

> due to pain, fatigue, and depression causing occasional limitations in ability to maintain concentration for extended periods, but not off task for more than 10% of the workday, as well as occasional limitations in ability to carry out detailed instructions; requires use of a can for prolonged ambulation; and is limited to brief and superficial interaction (i.e. infrequent and not very involved) with the public, coworkers, and supervisors.

(TR 727-36.) Subsequently, the ALJ noted that prior to the established disability onset date, Plaintiff was a younger individual age 45-49, but his age category changed to that of an individual closely approaching advanced age on May [redacted] 2013. (TR 737.) Then, in reliance on the VE's testimony, the ALJ determined that prior to May [redacted] 2013, Plaintiff was capable of performing a significant number of jobs in the national economy, but beginning on May [redacted] 2013, there were no such jobs that Plaintiff could perform. (TR 737-38.) Therefore, the ALJ found that Plaintiff was not disabled under the Social Security Act at any time prior to May [redacted] 2013, but became disabled on that date and continued to be disabled through the date of the decision. (TR 722-23, 738-39.)

V. LAW AND ANALYSIS

A. Standard of Review

Pursuant to 42 U.S.C. § 405(g), this Court has jurisdiction to review the Commissioner's final decisions. Judicial review of the Commissioner's

decisions is limited to determining whether his findings are supported by substantial evidence and whether he employed the proper legal standards. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Walters v. Comm'r*, 127 F.3d 525, 528 (6th Cir. 1997). Substantial evidence is more than a scintilla but less than a preponderance; it is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson*, 402 U.S. at 401 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *Walters*, 127 F.3d at 528. It is not the function of this Court to try cases de novo, resolve conflicts in the evidence, or decide questions of credibility. *See Brainard v. Sec'y of Health and Human Servs.*, 889 F.2d 679, 681 (6th Cir. 1989); *Garner v. Heckler*, 745 F.2d 383, 387 (6th Cir. 1984).

In determining the existence of substantial evidence, the court must examine the administrative record as a whole. *See Kirk v. Sec'y of Health and Human Servs.*, 667 F.2d 524, 536 (6th Cir. 1981), *cert. denied*, 461 U.S. 957 (1983). If the Commissioner's decision is supported by substantial evidence, it must be affirmed, even if the reviewing court would decide the matter differently, *Kinsella v. Schweiker*, 708 F.2d 1058, 1059 (6th Cir. 1983), and even if substantial evidence also supports the opposite conclusion. *See Her v. Comm'r*, 203 F.3d 388, 389-90 (6th Cir. 1999); *Mullen v. Bowen*, 800 F.2d 535, 545 (6th Cir. 1986) (en banc) (noting that the substantial evidence standard "presupposes that there is a zone of choice within which the decisionmakers can go either way, without interference by the courts"). "But '[a]n ALJ's failure to follow agency rules and regulations denotes a lack of substantial evidence, even

where the conclusion of the ALJ may be justified based upon the record.'" *Gayheart v. Comm'r of Soc. Sec.*, 710 F.3d 365, 374 (6th Cir. 2013) (quoting *Cole v. Astrue*, 661 F.3d 931, 937 (6th Cir. 2011)).

B. Framework for Social Security Determinations

Plaintiff's Social Security disability determination was made in accordance with a five- step sequential analysis. In the first four steps, Plaintiff was required to show that:

(1) Plaintiff was not presently engaged in substantial gainful employment; and

(2) Plaintiff suffered from a severe impairment; and

(3) the impairment met or was medically equal to a "listed impairment;" or

(4) Plaintiff did not have the residual functional capacity (RFC) to perform relevant past work.

See 20 C.F.R. § 404.1520(a)-(f). If Plaintiff's impairments prevented Plaintiff from doing past work, the Commissioner, at step five, would consider Plaintiff's RFC, age, education, and past work experience to determine if Plaintiff could perform other work. If not, Plaintiff would be deemed disabled. *See id.* at § 404.1520(g). The Commissioner has the burden of proof only on "the fifth step, proving that there is work available in the economy that the claimant can perform." *Her*, 203 F.3d at 391. To meet this burden, the Commissioner must make a finding "supported by

substantial evidence that [the claimant] has the vocational qualifications to perform specific jobs." *Varley v. Sec'y of Health and Human Servs.*, 820 F.2d 777, 779 (6th Cir. 1987). This "substantial evidence" may be in the form of vocational expert testimony in response to a hypothetical question, "but only 'if the question accurately portrays [the claimant's] individual physical and mental impairments.'" *Id.* (citations omitted).

C. Analysis

The Social Security Act authorizes "two types of remand: (1) a post judgment remand in conjunction with a decision affirming, modifying, or reversing a decision of the [Commissioner] (a sentence-four remand); and (2) a pre-judgment remand for consideration of new and material evidence that for good cause was not previously presented to the [Commissioner] (a sentence-six remand)." *Faucher v. Sec'y of Health and Human Servs.*, 17 F.3d 171, 174 (6th Cir. 1994) (citing 42 U.S.C. § 405(g)). Under a sentence-four remand, the Court has the authority to "enter upon the pleadings and transcript of the record, a judgment affirming, denying, or reversing the decision of the [Commissioner], with or without remanding the cause for a hearing. 42 U.S.C. § 405(g). Where there is insufficient support for the ALJ's findings, "the appropriate remedy is reversal and a sentence-four remand for further consideration." *Morgan v. Astrue*, 10-207, 2011 WL 2292305, at *8 (E.D. Ky. June 8, 2011) (citing *Faucher*, 17 F.3d at 174).

Plaintiff asserts that this matter should be reversed for an award of benefits or remanded for further proceedings under sentence four because (1) the ALJ erred in evaluating Listing 1.04; (2) the ALJ erred

in evaluating the medical opinion evidence; (3) the ALJ erred in evaluating Plaintiff's restrictions in concentration, persistence, or pace; (4) the ALJ's credibility assessment is erroneous; and (5) the ALJ's step-five determination is not supported by substantial evidence. (Docket no. 22.)

1. The ALJ's Assessment of Plaintiff's Impairments under Listing 1.04

Plaintiff challenges the ALJ's determination at step three of the sequential evaluation process that Plaintiff's impairments do not meet or medically equal Listing 1.04. (Docket no. 22 at 3-7.) At the third step of the sequential evaluation process, a claimant will be deemed presumptively disabled and eligible for benefits if his impairment meets or medically equals one of the listings in the Listing of Impairments. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). "When considering presumptive disability at Step Three, an ALJ must analyze the claimant's impairments in relation to the Listed Impairments and give a reasoned explanation of his findings and conclusions in order to facilitate meaningful review." *Christephore v. Comm'r of Soc. Sec.*, No. 11-13547, 2012 WL 2274328, at *6 (E.D. Mich. June 18, 2012) (citing *Reynolds v. Comm'r of Soc. Sec.*, 424 F. App'x 411, 416 (6th Cir. 2011)). A claimant must satisfy all of the criteria to meet a listing, or have impairments that are medically equivalent to or equal in severity and duration to the criteria of a listed impairment. *Id.*; *Rabbers v. Comm'r*, 582 F.3d 647, 653 (6th Cir. 2009). "Moreover, all of the criteria must be met concurrently for a period of twelve continuous

months." *McKeel v. Comm'r of Soc. Sec.*, No. 14-cv-12815, 2015 WL 3932546, at*8 (E.D. Mich. June 26, 2015) (citing 20 C.F.R. § 404.1525(c)(3), (4); 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.00D ("[b]ecause abnormal physical findings may be intermittent, their presence over a period of time must be established by a record of ongoing management and evaluation")). It is the claimant's burden to demonstrate that she meets or equals a listed impairment at the third step of the sequential evaluation process. *Foster v. Halter*, 279 F.3d 348, 354 (6th Cir. 2001). ("A claimant must demonstrate that her impairment satisfies the diagnostic description for the listed impairment in order to be found disabled thereunder.").

Under Listing 1.04, disorders of the spine (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture) are defined as those:

> resulting in compromise of a nerve root (including the cauda equina) or the spinal cord. With:
>
> > A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine); or

> B. Spinal arachnoiditis, confirmed by an operative note or pathology report of tissue biopsy, or by appropriate medically acceptable imaging, manifested by severe burning or painful dysesthesia, resulting in the need for changes in position or posture more than once every 2 hours; or
>
> C. Lumbar spinal stenosis resulting in pseudoclaudication, established by findings on appropriate medically acceptable imaging, manifested by chronic nonradicular pain and weakness, and resulting in inability to ambulate effectively, as defined in 1.00B2b.

20 C.F.R. Part 404, Subpart P, Appendix 1, Section 1.04. For a disorder of the spine to meet Listing 1.04A, "the simultaneous presence of all of the medical criteria in paragraph A must continue, or be expected to continue, for a continuous period of at least 12 months." Social Security Acquiescence Ruling (AR) 15-1(4), 80 FR 57418-02, 2015 WL 5564523, at *57420 (Sept. 23, 2015) (citing 20 C.F.R. §§ 404.1525(c)(4), 416.925(c)(4)). Stated differently, when the paragraph A criteria "are scattered over time, wax and wane, or are present on one examination but absent on another, the individual's nerve root compression would not rise to the level of severity required by listing 1.04A." *Id.*

Here, the ALJ found that Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments. (TR 725.) With regard to Listing 1.04, the ALJ explained:

> The degenerative disc disease does not meet or medically equal listing 1.04 because the claimant lacks the requisite motor and sensory deficits, and there is no evidence of spinal arachnoiditis or spinal stenosis resulting in pseudoclaudication. This finding is supported by the opinion of medical expert, Dr. Barnes, who testified that, in his opinion, the claimant did not meet or equal a medical listing. The undersigned gives significant weight to this opinion from Dr. Barnes, as it is consistent with the evidence in the record. Namely, in supporting this opinion, Dr. Barnes indicated that positive straight leg raising was not found on most of the examinations, as will be discussed in more detail below. Furthermore, Dr. Barnes noted that the physical findings of numbness, reflex changes, and atrophy were not consistently present over a 12-month period, consistent with the medical records. In addition, the MRI findings in the record, as discussed below, reflect only mild-to-moderate degenerative changes with no more than mild stenosis (Exhibits B2F/9, B12F/6, B22F/45, and B30F/22).

In making this finding regarding listing 1.04, the undersigned give [sic] little weight to the medical opinion of Alexander J. Ghanayem, M.D., who opined that the claimant "met and exceeded the criteria set forth for disability related to disorders of the spine as listed in section 1.04" (Exhibit B43F). Dr. Ghanayem noted "in 2005 he had significant lumbar spine disc disease"; however, the radiologist noted in August 2005 that the claimant had "mild degenerative disc disease and facet osteoarthritis" (Exhibit B38F/3). The doctor then noted that, by December 2009, the claimant's lumbar spine "showed significant and diffuse evidence of lumbar disc disease"; yet, the MRI study dated December 05, 2009, and re-interpreted on January 19, 2010 revealed no more than moderate abnormalities with no evidence of spinal canal stenosis, neural foramina stenosis, or disc protrusion (Exhibits B2F/9 and B12F/6). Mild-to-moderate degenerative changes were seen on a 2013 lumbar spine MRI, and an October 2014 MRI revealed only mild central canal stenosis (Exhibits B22F/45 and B30F/22). Dr. Ghanayem's opinion is contrary to the objective findings of multiple radiologists who reviewed the claimant's images. The undersigned also notes that Dr. Ghanayem only reviewed the claimant's medical records and never had the opportunity to

> examine, or even meet with and question, the claimant (Exhibit B43F).

(TR 725.)

Plaintiff argues that the ALJ erred in adopting the opinion of Dr. Barnes over that of Dr. Ghanayem. (Docket no. 22 at 4.) Plaintiff also argues that even if he cannot demonstrate that that he meets Listing 1.04A, Dr. Ghanayem testified that Plaintiff's impairments "more than equaled" the Listing. (Docket no. 25 at 1.) "However, the ALJ has the right to resolve conflicting respectable medical opinions." *Morreale v. Heckler*, 595 F. Supp. 907, 910 (E.D. Mich. 1984) (citing *LeMaster v. Weinberger*, 533 F.2d 337, 349 (6th Cir. 1976); *Halsey v. Richardson*, 441 F.2d 1230 (6th Cir. 1971)). *See also Foster v. Halter*, 279 F.3d 348, 353 (6th Cir. 2001) (It is not the court's role to resolve conflicting evidence in the record.). While the ALJ's notation that Dr. Ghanayem did not personally examine Plaintiff is questionable, particularly where Dr. Barnes also did not personally examine Plaintiff, it does not constitute a significant legal error requiring remand. Here, there is substantial evidence in the record that supports the ALJ's decision that Plaintiff did not meet or medically equal Listing 1.04, including the MRI reports, which the ALJ accurately cited as revealing only mild-to moderate degenerative changes; the objective medical evidence revealing the lack of a simultaneous presence of the paragraph A criteria (TR 245-46, 250, 252, 255, 285, 328-330, 410, 412, 414, 469, 486, 590, 636, 639, 1554, 1570, 1609, 1617, 1914, 1922-23, 1931, and 1957); and Dr. Barnes's opinion, upon which the ALJ was entitled to rely. Although there is also record evidence, including Dr.

Ghanayem's opinion, that tends to support Plaintiff's assertions, the ALJ's step-three determination is supported by substantial evidence, and it must be affirmed. *See Her v. Comm'r*, 203 F.3d at 389-90. Therefore, Plaintiff's Motion should be denied with regard to this issue.

2. The ALJ's Assessment of the Medical Opinion Evidence

Next, Plaintiff argues that the ALJ improperly evaluated the medical opinion evidence, specifically that of his treating physician, Dr. Wright, consultative examiner Dr. Jack Salomon, and the non-examining medical experts, Dr. Barnes and Dr. Ghanayem. (Docket no. 22 at 7-15.)

a. Dr. Wright

It is well settled that the opinions of treating physicians are generally accorded substantial deference. In fact, the ALJ must give a treating physician's opinion complete deference if it is supported by clinical and laboratory diagnostic evidence and it is not inconsistent with the other substantial evidence in the record. 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2). When an ALJ determines that a treating source's medical opinion is not controlling, he must determine how much weight to assign that opinion in light of several factors: (1) length of the treatment relationship and the frequency of examination; (2) nature and extent of the treatment relationship; (3) supportability of the opinion; (4) consistency of the opinion with the record as a whole; (5) specialization of the treating source; and (6) other factors. 20 C.F.R. §§ 404.1527(c)(2)-(6), 416.927(c)(2)-(6).

There is no *per se* rule that requires an articulation of each of the six regulatory factors listed in 20 C.F.R. §§ 404.1527(c)(2)-(6), 416.927(c)(2)-(6). *Norris v. Comm'r of Soc. Sec.*, No. 11-CV-11974, 2012 WL 3584664, at *5 (E.D. Mich. Aug. 20, 2012) (citing *Tilley v. Comm'r of Soc. Sec.*, 394 F. App'x 216, 222 (6th Cir. 2010)). An ALJ's failure to discuss the requisite factors may constitute harmless error (1) if "a treating source's opinion is so patently deficient that the Commissioner could not possibly credit it;" (2) "if the Commissioner adopts the opinion of the treating source or makes findings consistent with the opinion;" or (3) "where the Commissioner has met the goal of [§ 1527(c)]—the provision of the procedural safeguard of reasons—even though she has not complied with the terms of the regulation." *Nelson v. Comm'r of Soc. Sec.*, 195 F. App'x 462, 470 (6th Cir. 2006) (quoting *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 547 (6th Cir. 2004)).

The Commissioner requires its ALJs to "always give good reasons in [their] notice of determination or decision for the weight [they] give [a] treating source's opinion." 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2). Those good reasons must be "supported by the evidence in the case record, and must be sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave to the treating source's medical opinion and the reasons for that weight." *Wilson*, 378 F.3d at 544 (quoting SSR 96-2p, 1996 WL 374188, at *5 (1996)). The district court should not hesitate to remand when the Commissioner has failed to identify the weight assigned to a treating physician's opinion and provide good reasons for that weight. *See Cole v. Astrue*, 661

F.3d 931, 939 (6th Cir. 2011) ("This Court has made clear that '[w]e do not hesitate to remand when the Commissioner has not provided 'good reasons' for the weight given to a treating physician's opinion and we will continue remanding when we encounter opinions from ALJ's that do not comprehensively set forth the reasons for the weight assigned to a treating physician's opinion.") (citing *Hensley v. Astrue*, 573 F.3d 263, 267 (6th Cir. 2009)).

Plaintiff treated with Harold M. Wright, DO from October 2012 to April 2013. (TR 1552-71.) On April 25, 2013 and October 7, 2013, Dr. Wright completed substantially similar Medical Examination Reports with regard to Plaintiff, in which he opined that Plaintiff could lift less than 10 pounds occasionally but never more than 10 pounds; stand and/or walk for less than 2 hours in an 8-hour workday, sit for less than six hours in an 8-hour workday; use his arms for simple grasping and reaching but never for pushing, pulling, or fine manipulating; and operate foot/leg controls. (TR 1592-94, 1945-47.) Dr. Wright also opined that Plaintiff was limited in comprehension, memory, sustaining concentration, following simple directions, reading and writing, and social interaction. (*Id.*) Dr. Wright then completed a Physical Residual Functional Capacity Questionnaire with regard to Plaintiff on July 10, 2015. (TR 1888-96.) In this report, Dr. Wright opined that Plaintiff could occasionally lift less than 10 pounds but never more than 10 pounds; could sit or stand for only 10 minutes at time; could sit for less than 2 hours total in an 8-hour workday; could stand for less than 2 hours in an 8-hour workday; would need to walk around every 10 minutes in an 8-hour

workday for 5 minutes each time; would need to take 20-30 minute breaks every 10-15 minutes; would need a cane to ambulate; would be incapable of performing even low stress jobs; and would never be able to twist, stoop, crouch, or climb ladders or stairs, among other things.

> The ALJ summarized Dr. Wright's opinions and then assessed them as follows:
>
> The undersigned gives minimal weight to Dr. Wright's opinions for numerous reasons. First, despite preparing the most recent disabling opinion in July 2015, the doctor admitted to not having seen the claimant since April 2013, or over two years prior (Exhibit B31F/1). Moreover, the objective medical evidence in the record does not support the significant limitations proposed by Dr. Wright. Most notably, the numerous MRI studies showed no more than mild-to-moderate degenerative findings, which is inconsistent with Dr. Wright's suggestions.

(TR 734.)

"A physician qualifies as a treating source if the claimant sees her 'with a frequency consistent with accepted medical practice for the type of treatment and/or evaluation required for [the] medical condition.'" *Smith v. Comm'r of Soc. Sec.*, 482 F.3d 873, 876 (6th Cir. 2007) (alteration in original) (quoting 20 C.F.R. § 404.1502). Dr. Wright certainly qualified as Plaintiff's

treating physician from October 2012 to April 2013; thus, his April 2013 opinion qualifies as that of a treating physician and is generally entitled to substantial deference. Also, the undersigned concludes that his October 2013 opinion is not so far removed from the period of treatment to prevent it from being considered as a treating physician's opinion. But, it is undisputed that Dr. Wright had not treated Plaintiff for over two years when he rendered his July 2015 opinion. It would be inconsistent with the "ongoing treatment relationship" requirement of 20 C.F.R. § 404.1502 to treat that opinion as one authored by a treating physician. *See Tate v. Comm'r of Soc. Sec.*, 467 F. App'x 431, 433 (6th Cir. 2012). Accordingly, the ALJ properly discounted Dr. Wright's July 2015 opinion on this basis.

That being said, Dr. Wright's April and October 2013 opinions were entitled to controlling weight as long as they were "well-supported by medically acceptable clinical and laboratory diagnostic techniques" and "not inconsistent with the other substantial evidence in [the] case record." 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2). Plaintiff argues that Dr. Wright's opinions are entitled to deference because Dr. Wright was well aware of Plaintiff's conditions and treatment, particularly the treatment that Plaintiff underwent to alleviate his pain. (Docket no 22 at 8.) Plaintiff further argues that Dr. Wright's opinions are consistent with and were bolstered by the testimony of the non-examining medical expert, Dr. Ghanayem. (*Id.* at 8-9.) But Plaintiff's reliance on opinion evidence to support his argument in this regard does not defeat the ALJ's finding that Dr. Wright's opinions were inconsistent with the objective

medical evidence, specifically, the results of Plaintiff's MRIs, which constitute substantial evidence in this matter. The ALJ did not err in discounting Dr. Wright's April and October 2013 opinions as inconsistent with the mild-to-moderate MRI results. Based on the discussion above, the undersigned concludes that the ALJ provided good reasons for assigning little weight to Dr. Wright's opinions, which reasons are supported by the evidence of record and are sufficiently specific to clarify the reasons for that weight. Plaintiff's Motion should be denied with regard to this issue.

b. Dr. Salomon

Next, Plaintiff argues that the ALJ erred by assigning little weight to the opinion of consultative examiner Jack Salomon, M.D. and instead assigning great weight to the opinion of the non-examining medical expert, Dr. Barnes. (Docket no. 22 at 9-10.) Dr. Salomon conducted a physical evaluation of Plaintiff on July 2, 2013, with regard to Plaintiff's alleged disability. (TR 1615-21.) The parties do not dispute that Dr. Salomon was not a treating physician, as he only examined Plaintiff once on a consultative basis. The ALJ is not bound by a non-treating physician's opinion. *McKivens v. Comm'r*, No. 11-cv-14268, 2012 WL 3263847, at *11 (E.D. Mich. Jul. 9, 2012) (citation omitted). However, "[w]hen no treating physician opinion has been granted controlling weight ... the medical opinion of a consultative examiner is to be weighed considering all of the factors identified in 20 C.F.R. § 404.1527(c)(1) through (6)." *Id.* (citing 20 C.F.R. § 404.1527(e)(2)(iii)). Nevertheless, there is no per se rule that requires an articulation of each of the six

regulatory factors listed in 20 C.F.R. § 404.1527(c). *Norris v. Comm'r*, No. 11- CV-11974, 2012 WL 3584664, at *5 (E.D. Mich. Aug. 20, 2012) (citing *Tilley v. Comm'r*, 394 Fed. Appx. 216, 222 (6th Cir. 2010)).

Upon examining Plaintiff, Dr. Salomon rendered the following assessment: "Mr. Biestek probably has hepatitis C. He has lumbar radiculopathy. He may have some other problems also. At this time, he is not very functional. (TR 1617.) The ALJ evaluated Dr. Salomon's assessment as follows:

> At the conclusion of the consultative examination, Dr. Salomon opined that the claimant was "not very functional" (Exhibit B23F/3). The undersigned gives little weight to Dr. Salomon's opinion, as he does not give specific functional limitations but merely makes a blanket statement. Moreover, Dr. Salomon only examined the claimant on one occasion, and thus, has no treating relationship with the claimant. Although Dr. Salomon found positive straight leg raising upon examination, the diagnostic findings on the various MRIs do not support the disabling statement from the examiner.

(TR 734.) Here, the ALJ appropriately considered and discussed some of the regulatory factors in weighing Dr. Salomon's assessment. And to the extent that Dr. Salomon's vague statement that Plaintiff is "not very functional" constitutes a medical opinion under the regulations, the ALJ's failure to adopt Dr. Salomon's "opinion" is harmless because it is patently deficient

with regard to any functional limitations related thereto. *See* 20 C.F.R. §§ 404.1527(a)(1), 416.927(a)(1); Nelson, 195 F. App'x at 470. Moreover, Plaintiff does not allege any additional functional limitations that he believes the ALJ should have included based on Dr. Salomon's report. Therefore, Plaintiff's Motion should be denied in this regard.

c. Drs. Ghanayem and Barnes

First, with regard to Dr. Ghanayem, Plaintiff alleges that although the ALJ permitted Dr. Ghanayem to testify at the hearing regarding his previously-submitted written opinion, the ALJ erred by depriving Plaintiff of the ability to use Dr. Ghanayem as rebuttal evidence to the testimony of Dr. Barnes. (Docket no. 22 at 10-13.) Plaintiff relies on several authorities to support his argument: POMS § DI 27540.001; the Administrative Procedure Act (APA), 5 U.S.C. § 556(d); 20 C.F.R. § 404.929; 20 C.F.R. 404.950(a); and HALLEX I-2-6-60. POMS § DI 27540.001, however, is inapplicable to this matter, as it applies to proceedings in which the SSA plans to re-open the case of an individual who is already receiving disability benefits.

The APA provides that "[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d). As Defendant points out, however, this provision does not dictate the time and manner of rebuttal. (Docket no. 23 at 17.) In fact, the APA further provides that in determining claims for benefits, "an agency may, when a party will not be prejudiced thereby, adopt procedures

for the submission of all or part of the evidence in written form." 5 U.S.C. § 556(d). Accordingly, Plaintiff's argument that he should have been able to present rebuttal evidence at the hearing through Dr. Ghanayem's testimony is not supported by the APA. Notably, there is no evidence that Plaintiff sought to present his rebuttal evidence in any other manner.

The social security regulations also do not support Plaintiff's argument. 20 C.F.R. § 404.929 provides that a claimant may present and question witnesses at the hearing before the ALJ, but it does not provide any guidance regarding rebuttal evidence. 20 C.F.R. § 404.950(a) states that any party to a hearing has a right to appear before the ALJ to present evidence and state his or her position. Again, this regulation does not specifically address rebuttal evidence. Notably, neither of these regulations specifies that an ALJ's decision to disallow rebuttal evidence at the hearing constitutes legal error.

HALLEX I-2-6-60, which governs the testimony of claimants and witnesses, provides, in relevant part, that

> The ALJ determines the subject and scope of testimony from a claimant and any witness(es), as well as how and when the person testifies at the hearing. . . . If a claimant or witness requests to testify in a particular way, or asks to testify at a particular time during the hearing, the ALJ will consider whether there is a good reason for the request. . . . If the ALJ does not grant the request, the ALJ will either

> deny the request in writing before the hearing (and exhibit the document) or deny the request on the record during the hearing. In either circumstance, the ALJ will explain the reason(s) he or she denied the request.

Plaintiff argues that the ALJ offered no reasons for denying his request to present Dr. Ghanayam as a rebuttal witness at the hearing. (Docket no. 22 at 12.) Plaintiff is incorrect. At the hearing, the ALJ informed Plaintiff's attorney that her procedure was to direct questions selected from a pre-approved list to the medical expert and then provide the attorney with the opportunity to ask that witness questions. (TR 881.) The ALJ advised that she would not engage in a discussion among professionals. (TR 881.) The ALJ's actions in this regard are consistent with HALLEX I-2-6-70, which governs medical expert (ME) testimony and provides that "[t]he claimant and the representative have the right to question the ME fully on any pertinent matter within the ME's area of expertise. However, the ALJ will determine when they may exercise this right and whether questions asked or answers given are appropriate." Accordingly, Plaintiff's argument fails in this regard.

Next, Plaintiff argues that the ALJ erred by only evaluating Dr. Ghanayem's opinion at step three of the sequential evaluation process and failing to make any mention of Dr. Ghanayem's opinion in the RFC determination. (Docket no. 22 at 13.) Plaintiff argues in this regard that Dr. Ghanayem explained in his letter opinion that Plaintiff's subjective complaints

documented in the medical records were consistent with the nature of Plaintiff's condition and would render Plaintiff disabled. Plaintiff adds that Dr. Ghanayem testified at the hearing that statements of sitting or standing were reasonable and that the fact that Plaintiff needed to lie down or elevate his legs was entirely consistent with his pathology. Plaintiff argues that the ALJ's failure to mention this evidence warrants remand.

"[I]t is well settled that '[a]n ALJ can consider all the evidence without directly addressing in his written decision every piece of evidence submitted by a party.'" *Kornecky v. Comm'r of Soc. Sec.*, 167 F. App'x 496, 507-08 (6th Cir. 2006) (quoting *Loral Def. Sys.-Akron v. N.L.R.B.*, 200 F.3d 436, 453 (6th Cir. 1999)). Here, the record demonstrates that the ALJ did in fact consider both the letter opinion and the testimony presented by Dr. Ghanayem, as she presided over the hearing at which Dr. Ghanayem testified, and she indicated at that hearing that she "really did understand [Dr. Ghanayem's] letter very clearly." (TR 883.) Thus, the ALJ's failure to explicitly discuss the evidence cited by Plaintiff above in the decision does not constitute reversible error. Furthermore, the ALJ sufficiently discussed her reasons for assigning little weight to Dr. Ghanayem's opinion at step-three of the sequential evaluation process, and her failure to repeat those reasons later in her decision was not erroneous.

With regard to Dr. Barnes, Plaintiff argues that the ALJ erred by assigning his opinion great weight while failing to account for all of the functional limitations he assessed in Plaintiff's RFC. (Docket no. 22 at 14-15.) There is only one limitation specifically

assessed by Dr. Barnes that the ALJ did not incorporate fully into the RFC – that Plaintiff would not be able to bend over at the waist to pick up ten pounds. (TR 906.) But an ALJ is not required to adopt all of a non-examining source's findings, even if the ALJ gives the opinion great weight. *See Smith v. Comm'r of Soc. Sec.*, Case No. 5:11 CV 2104, 2013 WL 1150133, at *11 (N.D. Ohio Mar. 19, 2013) ("Simply put, there is no legal requirement for an ALJ to explain each limitation or restriction he adopts or, conversely, does not adopt from a non-examining physician's opinion, even when it is given significant weight."). For the reasons stated above, Plaintiff's Motion regarding the ALJ's assessment of the medical opinion evidence should be denied.

3. The ALJ's Assessment of Plaintiff's Limitations in Concentration, Persistence, or Pace

Plaintiff argues that the ALJ failed to adequately account for Plaintiff's moderate limitations in concentration, persistence, or pace in Plaintiff's RFC and in her hypothetical question to the VE. (Docket no. 22 at 15-17.) Specifically, Plaintiff argues that the ALJ's RFC and hypothetical question limiting Plaintiff to "simple, routine tasks" at the SVP 1 or 2 level essentially limited Plaintiff to unskilled work, and the skill level of a job does not necessarily relate to the difficulty an individual would have in meeting the demands of the job, including how quickly the individual could meet those demands. (Docket no. 22 at 15-16.) As Defendant points out, however, "[c]ase law in this Circuit does not support

a rule that a hypothetical providing for simple, unskilled work is per se insufficient to convey moderate limitations in concentration, persistence and pace." (Docket no. 23 at 22 (quoting *Kepke v. Comm'r of Soc. Sec.*, 636 F. App'x 625, 635 (6th Cir. 2016).) *See also Lewicki v. Comm'r of Soc. Sec.*, No. 09- 11844-BC, 2010 WL 3905375, at *2 (E.D. Mich. Sept. 30, 2010) (citations omitted) (Findings of moderate limitations in concentration, persistence, or pace do not necessarily preclude "simple, routine, unskilled work.").

Courts in this district draw a distinction between cases in which a medical expert finds a moderate deficiency in concentration, persistence, or pace from those in which the ALJ independently finds such a limitation. "When the ALJ has found such a limitation, the ALJ must incorporate these limitations into the hypothetical questions." *McPhee v. Comm'r of Soc. Sec.*, No. 11-13399, 2013 WL 1277889, at *2 (E.D. Mich. Mar. 27, 2013) (citations omitted). Courts are more likely to order a sentence-four remand in cases where the ALJ made the finding of moderate deficiencies in concentration, persistence, or pace in the absence of a medical opinion that found similar moderate deficiencies and indicated that the plaintiff was still capable of sustained work. *Cwik v. Comm'r of Soc. Sec.*, No. 10-15121, 2012 WL 1033578, at *10 (E.D. Mich. Feb. 23, 2012) (citing *Hicks v. Comm'r of Soc. Sec.*, No. 10-13643, 2011 WL 6000701, at *4 (E.D. Mich. Nov. 28, 2011)).

Here, the ALJ did not make an independent decision regarding Plaintiff's ability to maintain concentration, persistence, or pace. In fact, the ALJ relied upon the opinion of Dr. Hugh Bray, Ph.D., LP in

making such a determination. (TR 727 (citing TR 1624-26).) Dr. Bray conducted a consultative evaluation of Plaintiff's mental status on July 11, 2013, after which he found that Plaintiff's mental abilities to relate to others, to understand, remember, and carry out tasks, to maintain concentration, persistence, pace, and effort, and to withstand stress and pressure associated with day to day work activities were moderately impaired. (TR 1623-27.) Despite these findings, Dr. Bray opined that Plaintiff was able to perform simple, repetitive tasks and that he could likely handle more complex tasks, although he may have moderate difficulty in performing multiple-step tasks. (TR 1626.) Notably, Dr. Bray did not assess any additional functional limitations related to his findings, including the finding that Plaintiff had moderate limitations in maintaining concentration, persistence, or pace. The ALJ then discussed and assigned great weight to Dr. Bray's opinion, and incorporated the limitations assessed by Dr. Bray into Plaintiff's RFC by limiting him to work involving:

> simple, routine tasks such as those jobs at the SVP 1 or 2 level due to pain, fatigue, and depression causing occasional limitations in ability to maintain concentration for extended periods, but not off task for more than 10% of the workday, as well as occasional limitations in ability to carry out detailed instructions; . . . and [he] is limited to brief and superficial interaction (i.e. infrequent and not very involved) with the public, coworkers, and supervisors.

(TR 728, 733.)

The ALJ also relied upon and assigned great weight to the opinion of Dr. Edward Czarnecki, Ph.D., the non-examining state-agency consultant who made an unfavorable disability determination in this matter on July 23, 2013. (TR 735, 953-68.) In making that determination, Dr. Czarnecki assessed moderate difficulties in Plaintiff's ability to maintain concentration, persistence, or pace, yet he found that Plaintiff continued to retain the mental capacity for simple, rote, repetitive, unskilled work-related activity. (TR 961, 966.)

The discussion above demonstrates that the ALJ relied upon and adopted the opinions of two medical sources that assessed Plaintiff's moderate difficulties in maintaining concentration, persistence, and pace, and found that Plaintiff was still able to engage in substantial gainful activity, albeit with limitations. The ALJ then incorporated those limitations into Plaintiff's RFC and the hypothetical questions that she posed to the VE, to which the VE responded that there were jobs existing in significant numbers in the national economy that Plaintiff could perform. (TR 855-62.) There is no error here on the part of the ALJ, as the ALJ appropriately accommodated for Plaintiff's limitations in concentration, persistence, or pace in the RFC and the hypothetical questions. It is therefore recommended that Plaintiff's Motion for Summary Judgment on this issue be denied.

4. The ALJ's Credibility Assessment

Plaintiff asserts that the ALJ erred in assessing Plaintiff's credibility and in rejecting the statements of Plaintiff's mother, Rita Biestek. (Docket no. 22 at 17-22.) "[A]n ALJ's findings based on the credibility of the applicant are to be accorded great weight and deference, particularly since an ALJ is charged with the duty of observing a witness's demeanor and credibility." *Walters v. Comm'r*, 127 F.3d 525, 531 (6th Cir. 1997). But credibility assessments are not insulated from judicial review. Despite the deference that is due, such a determination must nevertheless be supported by substantial evidence. *Id.* An ALJ's credibility determination must contain "specific reasons . . . supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight." SSR 96–7p.[1] "It is not sufficient to make a conclusory statement that 'the individual's allegations have been considered' or that 'the allegations are (or are not) credible.'" *Id.* "[T]he adjudicator may find all, only some, or none of an individual's allegations to be credible" and may also find the statements credible to a certain degree. *Id.*

Further, to the extent that the ALJ found that Plaintiff's statements are not substantiated by the

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[1] SSR 96-7p has been superseded by SSR 16-3p, effective March 28, 2016. *See* SSR 16-3p, 2016 WL 1119029, at *1; 2016 WL 1237954. Nevertheless, because the ALJ's decision in this matter was rendered prior to the effective date of SSR 16-3p, the ALJ was obligated to comply with SSR 96-7p. *See Combs v. Comm'r of Soc.*

objective medical evidence in the record, the Regulations explicitly provide that "we will not reject your statements about the intensity and persistence of your pain or other symptoms or about the effect your symptoms have on your ability to work solely because the available objective medical evidence does not substantiate your statements." 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2). The ALJ will consider: (1) the claimant's daily activities, (2) the location, duration, frequency, and intensity of the claimant's pain or other symptoms, (3) precipitating and aggravating factors; (4) the type, dosage, effectiveness, and side effects of any medication taken to alleviate pain or other symptoms, (5) treatment, other than medication, for symptom relief, (6) any measures used to relieve the symptoms, and (7) functional limitations and restrictions due to the pain or other symptoms. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3); SSR 96-7p; *see also Felisky v. Bowen*, 35 F.3d 1027, 1039-40 (6th Cir. 1994) (applying these factors).

Here, the ALJ considered and discussed Plaintiff's hearing testimony and other subjective complaints in conjunction with the record evidence, and she found that Plaintiff's allegations were not entirely credible. (TR 729.) The ALJ explained this assessment as follows:

> In assessing the credibility of the claimant, the undersigned notes that the treatment for his various impairments

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Sec., 459 F.3d 640, 642 (6th Cir. 2006) ("The Act does not generally give the SSA the power to promulgate retroactive regulations.")

were [sic] described as being relatively effective in controlling his symptoms. For instance, in January 2011, he reported that "Demerol help[ed] his pain" (Exhibit B13F/6). The claimant received bilateral medial branch blocks on April 6, 2011, and indicated that his pain level was 1/10 in severity (Exhibits B11F/27 and B20F/16). On January 20, 2012, he reported that physical therapy was helpful and that the injections provided at the prior office visit were "extremely beneficial" (Exhibit B17F/2). On May 22, 2014, the claimant reported that the back injections helped "some" (Exhibit B29F/6). The relative effectiveness of the treatment diminishes the credibility of the completely disabling allegations and supports a finding that he has been capable of performing work within the restricted range of sedentary work identified.

At one point or another in the record (either in forms completed in connection with the application and appeal, in medical reports or records, or in the claimant's testimony), the claimant reported the following daily activities: reading the newspaper, preparing simple meals, visiting his son at least twice a week, driving, taking care of his basic needs on a consistent basis, doing some laundry, shopping, cashing checks,

> providing childcare, watching television, running errands, playing video games, and making appointments (Exhibits B14E, B5F, and B24F/2; testimony). These activities require functioning within the limited range of sedentary work identified.
>
> The undersigned also notes that the claimant has been noncompliant with prescribed treatment. Most notably, records from Hegira reflect numerous no shows and cancelations by the claimant (Exhibits B18F, B21F, B27F, and B28F). Moreover, as of June 18, 2014, he reported only using pain medications "once in a while as needed" (Exhibit B29F/4). The claimant's noncompliance with his treatment suggests that the symptoms may not be as limiting as the claimant has alleged in connection with this application and reflects poorly on the credibility of his allegations.

(TR 735-36.)

Plaintiff raises a few specific issues with regard to the ALJ's credibility analysis. First, Plaintiff claims that the ALJ's characterization of his treatment as "relatively effective" is flawed and that the ALJ played doctor in making such a characterization. (Docket no. 22 at 18-19; docket no. 25 at 7.) Plaintiff's argument lacks merit, as the regulations specifically provide that the ALJ may consider the effectiveness of Plaintiff's treatment, as well as the intensity of his pain in

determining the credibility of Plaintiff's disabling allegations. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3); SSR 96-7p. Plaintiff argues that the ALJ "cherry-picked" the evidence in this regard and points to instances in the record in which his treatment was not effective in controlling his symptoms. (Docket no. 22 at 18-19.) However, as Defendant points out, where there is evidence in the record that tends to support the positions of both parties, "the same process can be described more neutrally as weighing the evidence." (*See* docket no. 23 at 24 (quoting *White v. Comm'r of Soc. Sec.*, 572 F.3d 272, 284 (6th Cir. 2009)).) Here, the ALJ properly cited to the evidence in the record that explains her reasons for finding Plaintiff's disabling statements to be not entirely credible in accordance with her duty to do so under SSR 96-7p.

Next, Plaintiff argues that the ALJ inappropriately characterized his daily activities, relying on the Sixth Circuit's decision in *Rogers v. Comm'r of Soc. Sec.*, 486 F.3d 234, 248-49 (6th Cir. 2007) for the principle that minimal daily activities are not comparable to typical work activities. (Docket no. 22 at 19-20.) The ALJ, however, did not equate Plaintiff's daily activities to work activities; she discounted Plaintiff's disabling statements on the basis that Plaintiff's daily activities "require functioning within the limited range of sedentary work identified." (TR 736.) Moreover, the ALJ did not rely solely on Plaintiff's ability to perform daily activities in determining that Plaintiff is not disabled or in finding that Plaintiff's allegations were not entirely credible. The ALJ relied on several items, such as the objective medical evidence,

the medical opinion evidence, Plaintiff's daily activities, and Plaintiff's treatment, among other things. The ALJ's consideration of Plaintiff's daily activities is not error. To the contrary, the ALJ is required to consider Plaintiff's daily activities as part of her analysis.

Plaintiff also argues that the ALJ erred in discounting his credibility based on his non- compliance with treatment. (Docket no. 22 at 20-21.) To support his argument, Plaintiff cites Dr. Barnes's testimony that he did not find evidence of non-compliance in Plaintiff's file. (*Id.* at 21 (citing TR 904).) But the fact that Dr. Barnes did not find such evidence does not mean that it does not exist. The ALJ specifically identified the records of Plaintiff's numerous no shows and cancellations of his appointments at Hegira as evidence of this non-compliance. (TR 736.) In his brief, Plaintiff cites a lack of medical insurance for his failure to attend these appointments, but the record evidence does not necessarily support Plaintiff's allegation in this regard. (*See, e.g.*, TR 683, 699-700, 709-10, 1725, 1741, 1763, 1779.) The ALJ also cites to Plaintiff's June 18, 2014 report that he was only taking his pain medication as needed as evidence of Plaintiff's non-compliance with treatment. While this report does not necessarily reflect Plaintiff's credibility during the period at issue in this matter, the ALJ did cite to other evidence of Plaintiff's non-compliance with his medication during the relevant period. Specifically, the ALJ pointed out that on September 28, 2012, Plaintiff indicated that he was not telling the nurse practitioner about not taking his medication because he did not want to hurt his chances of getting SSI. (TR 732 (citing 1522).)

The immediate discussion demonstrates that the ALJ set forth numerous legitimate reasons for discrediting Plaintiff's hearing testimony and written statements in her decision, many of which apply the factors set forth in 20 C.F.R. §§ 404.1529(c)(3) and 416.929(c)(3), and SSR 96-7p. Moreover, the ALJ supported her finding that the severity of Plaintiff's subjective complaints was not supported by the objective medical evidence by explicitly discussing and citing to several examples of inconsistency between Plaintiff's complaints and the medical record. Thus, the ALJ's decision is sufficiently specific to make clear to Plaintiff and to the court the weight that she gave to Plaintiff's statements and the reasons for that weight. The ALJ's assessment of Plaintiff's credibility is supported by substantial evidence and should not be disturbed. Because the ALJ's determination that Plaintiff's statements were not entirely credible is supported by substantial evidence, her decision to assign little weight the statements made by Plaintiff's mother, Rita Biestek, on the basis that her statements were consistent with Plaintiff's statements is not erroneous. Plaintiff's Motion should be denied in this regard.

5. The ALJ's Step-Five Determination

Plaintiff argues that the ALJ's step-five determination is not supported by substantial evidence because the VE's testimony upon which she relies appears to be "conjured out of whole cloth." (Docket no. 22 at 22 (quoting *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002)).) As Plaintiff points out, the VE based her testimony regarding off-task tolerance, the sit-stand

option, the use of a cane, and the number of jobs available (issues not addressed by the Dictionary of Occupational Titles (DOT)), on her eleven-year experience as a vocational rehabilitation consultant, which included talking with employers, performing on-the-job analysis, and conducting her own individual labor market surveys. (Docket no. 22 at 23; TR 859, 865-66, 869-71.) After Plaintiff's attorney requested this evidence of the VE's experience, the VE explained that the job analyses were part of "people's private confidential files;" the ALJ then informed Plaintiff's counsel that she would not require the VE to produce the job analyses or the surveys and told counsel that he could appeal the issue if he so desired. (TR 865, 870.)

Plaintiff argues that the ALJ's acceptance and reliance upon the VE's testimony without any supporting evidence or verification of the VE's qualifications constitutes reversible error. (Docket no 22 at 22-24.) Plaintiff relies on Seventh Circuit precedent to support his argument in this regard, including *McKinnie v. Barnhart*, 368 F.3d 907, 911 (7th Cir. 2004) (quoting *Donahue*, 279 F.3d at 446) ("A vocational expert is 'free to give a bottom line,' but the data and reasoning underlying that bottom line must be 'available on demand' if the claimant challenges the foundation of the vocational expert's opinions. 'If the basis of the vocational expert's conclusions is questioned at the hearing . . . then the ALJ should make an inquiry . . . to find out whether the purported expert's conclusions are reliable.'"). As Defendant points out, however, the Sixth Circuit has not adopted the Seventh

Circuit precedent on which Plaintiff relies, and the Court will not do so here.

According to the law of this Circuit, an ALJ is entitled to "rely solely on the vocational expert's testimony," even where that testimony is not based on the DOT, but on the VE's professional experience. *Conn v. Sec'y of Health & Human Servs.*, 51 F.3d 607, 610 (6th Cir. 1995); *Lee v. Comm'r of Soc. Sec.*, 529 F. App'x 706, 715 (6th Cir. 2013). *See also* SSR 00-4P, 2000 WL 1898704, at *2 (S.S.A. Dec. 4, 2000) (Evidence from VEs can include information obtained directly from employers or from a VE's own professional experience.). "Moreover, '[n]othing in SSR 00–4p places an affirmative duty on the ALJ to conduct an independent investigation into the testimony of witnesses to determine if they are correct.'" *Wilson v. Comm'r of Soc. Sec.*, No. 10-13828, 2011 WL 2607098, at *6 (E.D. Mich. July 1, 2011) (quoting *Martin v. Comm'r of Soc. Sec.*, 170 F. App'x 369, 374 (6th Cir. 2006)). Indeed, the ALJ is responsible for determining the credibility of the VE's testimony, and the ALJ's credibility findings are subject to substantial deference on review. *Sias v. Sec'y of Health & Human Servs.*, 861 F.2d 475, 480 (6th Cir. 1988); *King v. Heckler*, 742 F.2d 968, 974 (6th Cir. 1984). Here, the credibility of the VE's testimony was fully probed at the hearing in accordance with the law of this Circuit, the VE testified that her testimony was based upon the DOT and her extensive experience as a vocational rehabilitation consultant, and the ALJ appropriately accepted and relied upon the VE's testimony on this basis. Accordingly, the ALJ did not commit legal error here.

Plaintiff also argues that the VE's descriptions of the jobs available to Plaintiff do not exactly match the job descriptions of the DOT codes provided by the VE. (Docket no. 22 at 25.) Specifically, Plaintiff argues that the VE named the job associated with DOT code 713.687-018 as "bench assembler," but the actual title of this occupation as provided by the DOT is "final assembler," and while the VE named the job associated with DOT code 521.687-086 as "sorter," the actual job title under the DOT is "nut sorter." (*Id.*) Plaintiff's argument in this regard is undeveloped, as it fails to demonstrate that the VE's alleged misstatements amount to any cognizable error. Furthermore, an ALJ "may rely on the testimony of the vocational expert even if it is inconsistent with the job descriptions set forth in the [DOT]." *Conn*, 51 F.3d at 610 (citing *Basinger v. Sec'y of Health and Human Servs.*, 33 F.3d 54 (6th Cir. 1994)).

Plaintiff then questions whether the jobs cited by the VE even exist because the DOT descriptions for these occupations have not been updated since 1977. (Docket no. 22 at 25.) But while the DOT descriptions are not necessarily current, the Social Security Administration continues to rely primarily on the DOT for information about the requirements of work in the national economy in making disability determinations. SSR 00-4P, 2000 WL 1898704, at *2. Therefore, the ALJ and the VE's reliance on the DOT in this regard was not erroneous.

Finally, Plaintiff argues that the ALJ erred by assigning little weight to the vocational opinion of Lee Knutson, which was purportedly obtained by Plaintiff's

counsel in this matter. (Docket no. 22 at 24-25; TR 1296-98.) Plaintiff's argument lacks merit. Mr. Knutson opined regarding occupations that are completely different from those which the ALJ found that Plaintiff can perform. (TR 1297.) The ALJ appropriately found that Mr. Knutson's opinion was irrelevant and assigned it little weight. Plaintiff's Motion regarding the propriety of the ALJ's step-five determination should be denied.

VI. CONCLUSION

For the reasons stated herein, the court should **DENY** Plaintiff's Motion for Summary Judgment (docket no. 22) and **GRANT** Defendant's Motion for Summary Judgment (docket no. 23).

REVIEW OF REPORT AND RECOMMENDATION

Either party to this action may object to and seek review of this Report and Recommendation, but must act within fourteen (14) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing objections which raise some issues but fail to raise others with specificity will not preserve all objections that a party might have to this Report and Recommendation. *Willis v. Sec'y of Health and Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th

Cir. 1987). Pursuant to Rule 72.1(d)(2) of the Local Rules of the United States District Court for the Eastern District of Michigan, a copy of any objection must be served upon this Magistrate Judge.

Within fourteen (14) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

Dated: February 24, 2017 s/ Mona K. Majzoub
MONA K. MAJZOUB
UNITED STATES
MAGISTRATE JUDGE

PROOF OF SERVICE

I hereby certify that a copy of this Report and Recommendation was served upon counsel of record on this date.

Dated: February 24, 2017 / Lisa C. Bartlett
Case Manager

Appendix D

SOCIAL SECURITY ADMINISTRATION
Office of Disability Adjudication and Review

DECISION

IN THE CASE OF	CLAIM FOR
Michael John Biestek (Claimant)	Period of Disability, Disability Insurance Benefits, and Supplemental Security Income
_____ (Wage Earner)	[REDACTED] (Social Security Number)

JURISDICTION AND PROCEDURAL HISTORY

This case is before the undersigned Administrative Law Judge on remand from the Appeals Council pursuant to a remand from the United States District Court for the Eastern District of Michigan (Exhibit B12A). On March 25, 2010, the claimant filed a Title II application for a period of disability and disability insurance benefits. The claimant also filed a Title XVI application for supplemental security income on March 25, 2010. In both applications, the claimant alleged disability beginning October 28, 2009. These claims were denied initially on August 17, 2010. Thereafter, the claimant filed a written request for hearing on October 8, 2010 (20

CFR 404.929 et seq. and 416.1429 et seq.). The claimant appeared and testified at a hearing before an Administrative Law Judge (ALJ) on June 24, 2011, in Detroit, Michigan, after which, an unfavorable decision was issued (Exhibit B7A).

The claimant then appealed the unfavorable decision; however, the Appeals Council denied the claimant's request for review on February 21, 2013, thus, making that decision the final decision of the Commissioner (Exhibit B8A). The claimant subsequently filed an action for judicial review in the United States District Court for the Eastern District of Michigan (Exhibit B11A). On May 30, 2014, Magistrate Judge, Mona Majzoub, issued a Report and Recommendation granting the claimant's Motion for Summary Judgment in part and denying it in part (Exhibit B11A). The magistrate's Report and Recommendation indicated that the hearing decision did not include the opinion of a medical expert to confirm that the claimant did not medically equal Listing 1.04 (Exhibit B11A/15). The Report and Recommendation further found that the hearing decision failed to define the duration of the sit/stand option in the residual functional capacity (Exhibit B11A/18).

Magistrate Judge Majzoub denied the claimant's motion regarding issues related to consideration of his hepatitis C, mental restrictions, credibility, and the claimant's mother's opinions (Exhibit B11A). On July 31 2014, Chief Judge Gerald Rosen adopted Magistrate Judge Majzoub's Report and Recommendation and remanded the case to the Commissioner (Exhibit B11A/3-4). The Appeals Council subsequently issued an Order vacating

the decision and remanding the case for further proceedings, consistent with the District Court's Order (Exhibit B12A). The Appeals Council further noted that the claimant filed a subsequent SSI claim on April 2, 2013, which should be consolidated into a single electronic record, with a new decision issued on the consolidated claims (Exhibit B12A).

Upon remand, the claimant appeared and testified at a hearing held on July 21, 2015, in Detroit, Michigan. Also appearing and testifying was Erin O'Callaghan, an impartial vocational expert. A supplemental hearing took place on November 6, 2015, where Frank L. Barnes, an impartial medical expert, appeared and testified by telephone. At the request of the claimant's representative, Alexander J. Ghanayem, M.D., also appeared and testified via telephone at that hearing. The claimant is represented by Frederick J. Daley, Jr, an attorney.

The claimant previously filed Title II and Title XVI applications on February 7, 2007, with an alleged onset date of June 3, 2005. The claim was denied initially, and the claimant filed a request for hearing. After a hearing was held, an unfavorable decision was issued on October 29, 2009, finding the claimant not disabled from June 3, 2005, through the date of the decision (Exhibit B1A). The claimant did not appeal the unfavorable decision, and that unfavorable decision, dated October 29, 2009, became the final decision of the Commissioner, binding on all parties. Accordingly, the issue of disability is *res judicata* through the date of that decision. While the undersigned has considered all of the medical records, the undersigned attributes less weight to the evidence

of disability prior to October 30, 2009, since the issue of disability is *res judicata* up to that date.

As further discussed below, the undersigned finds there has been a change in the claimant's condition since the October 2009 decision, and the substantial evidence of record supports a change in the claimant's residual functional capacity.

ISSUES

The issue is whether the claimant is disabled under sections 216(i), 223(d) and 1614(a)(3)(A) of the Social Security Act. Disability is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment or combination of impairments that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months.

With respect to the claim for a period of disability and disability insurance benefits, there is an additional issue whether the insured status requirements of sections 216(i) and 223 of the Social Security Act are met. The claimant's earnings record shows that the claimant has acquired sufficient quarters of coverage to remain insured through December 31, 2010. Thus, the claimant must establish disability on or before that date in order to be entitled to a period of disability and disability insurance benefits.

HOLDING

After careful consideration of all the evidence, the Administrative Law Judge finds that the claimant was

not disabled prior to May [redacted] 2013, but became disabled on that date and has continued to be disabled through the date of this decision. The claimant was not under a disability within the meaning of the Social Security Act at any time through December 31, 2010, the date last insured.

APPLICABLE LAW

Under the authority of the Social Security Act, the Social Security Administration has established a five-step sequential evaluation process for determining whether an individual is disabled (20 CFR 404.1520(a) and 416.920(a)). The steps are followed in order. If it is determined that the claimant is or is not disabled at a step of the evaluation process, the evaluation will not go on to the next step.

At step one, the undersigned must determine whether the claimant is engaging in substantial gainful activity (20 CFR 404.1520(b) and 416.920(b)). Substantial gainful activity (SGA) is defined as work activity that is both substantial and gainful. "Substantial work activity" is work activity that involves doing significant physical or mental activities (20 CFR 404.1572(a) and 416.972(a)). "Gainful work activity" is work that is usually done for pay or profit, whether or not a profit is realized (20 CFR 404.1572(b) and 416.972(b)). Generally, if an individual has earnings from employment or self-employment above a specific level set out in the regulations, it is presumed that he has demonstrated the ability to engage in SGA (20 CFR 404.1574, 404.1575, 416.974, and 416.975). If an individual engages in SGA, he is not disabled regardless of how severe his physical or mental impairments are and regardless of his age, education,

and work experience. If the individual is not engaging in SGA, the analysis proceeds to the second step.

At step two, the undersigned must determine whether the claimant has a medically determinable impairment that is "severe" or a combination of impairments that is "severe" (20 CFR 404.1520(c) and 416.920(c)). An impairment or combination of impairments is "severe" within the meaning of the regulations if it significantly limits an individual's ability to perform basic work activities. An impairment or combination of impairments is "not severe" when medical and other evidence establish only a slight abnormality or a combination of slight abnormalities that would have no more than a minimal effect on an individual's ability to work (20 CFR 404.1521 and 416.921; Social Security Rulings (SSRs) 85-28, 96-3p, and 96-4p). If the claimant does not have a severe medically determinable impairment or combination of impairments, he is not disabled. If the claimant has a severe impairment or combination of impairments, the analysis proceeds to the third step.

At step three, the undersigned must determine whether the claimant's impairment or combination of impairments is of a severity to meet or medically equal the criteria of an impairment listed in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, and 416.926). If the claimant's impairment or combination of impairments is of a severity to meet or medically equal the criteria of a listing and meets the duration requirement (20 CFR 404.1509 and 416.909), the claimant is disabled. If it does not, the analysis proceeds to the next step.

Before considering step four of the sequential evaluation process, the undersigned must first determine the claimant's residual functional capacity (20 CFR 404.1520(e) and 416.920(e)). An individual's residual functional capacity is his ability to do physical and mental work activities on a sustained basis despite limitations from his impairments. In making this finding, the undersigned must consider all of the claimant's impairments, including impairments that are not severe (20 CFR 404.1520(e), 404.1545, 416.920(e), and 416.945; SSR 96-8p).

Next, the undersigned must determine at step four whether the claimant has the residual functional capacity to perform the requirements of his past relevant work (20 CFR 404.1520(f) and 416.920(f)). The term past relevant work means work performed (either as the claimant actually performed it or as it is generally performed in the national economy) within the last 15 years or 15 years prior to the date that disability must be established. In addition, the work must have lasted long enough for the claimant to learn to do the job and have been SGA (20 CFR 404.1560(b), 404.1565, 416.960(b), and 416.965). If the claimant has the residual functional capacity to do his past relevant work, the claimant is not disabled. If the claimant is unable to do any past relevant work or does not have any past relevant work, the analysis proceeds to the fifth and last step.

At the last step of the sequential evaluation process (20 CFR 404.1520(g) and 416.920(g)), the undersigned must determine whether the claimant is able to do any other work considering his residual functional capacity, age,

education, and work experience. If the claimant is able to do other work, he is not disabled. If the claimant is not able to do other work and meets the duration requirement, he is disabled. Although the claimant generally continues to have the burden of proving disability at this step, a limited burden of going forward with the evidence shifts to the Social Security Administration. In order to support a finding that an individual is not disabled at this step, the Social Security Administration is responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that the claimant can do, given the residual functional capacity, age, education, and work experience (20 CFR 404.1512(g), 404.1560(c), 416.912(g) and 416.960(c)).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The claimant was born on May [redacted] 1963, and is 52 years old. He was 46 years old on October 28, 2009, the alleged onset date of disability. The claimant has a 12th grade education and past relevant work classified by the vocational expert as a carpenter (scaffold builder) (semi-skilled/medium) (Exhibit B37E/testimony). After careful consideration of the entire record, the undersigned makes the following findings:

1. The claimant meets the insured status requirements of the Social Security Act through December 31, 2010 (B20D).

2. The claimant has not engaged in substantial gainful activity since the alleged onset date (20 CFR 404.1571 *et seq.*, and 416.971 *et seq.*).

3. Since the alleged onset date of disability, October 28, 2009, the claimant has had the following severe impairments: degenerative disc disease, hepatitis C, asthma, and depression (20 CFR 404.1520(c) and 416.920(c)).

The second step of the sequential evaluation involves determining whether the claimant has a severe impairment, which is defined as an impairment or combination of impairments which significantly limits (has more than a minimal effect on) an individual's ability to perform basic work activities. The claimant's above-listed impairments produce limitations which meet this definition of severe, as will be clear from the discussion of the claimant's residual functional capacity later in this decision.

A May 8, 2015, MRI of the left upper extremity showed evidence of a short linear partial thickness intrasubstance tear of the infraspinatus tendon at the footprint (Exhibit B33F/1). However, there is no evidence of further treatment for this impairment since that date or evidence that it was expected to last greater than 12 months. Thus, it is not a severe impairment for purposes of this decision.

4. Since the alleged onset date of disability, October 28, 2009, the claimant has not had an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926).

The degenerative disc disease does not meet or medically equal listing 1.04 because the claimant lacks the requisite motor and sensory deficits, and there is no evidence of spinal arachnoiditis or spinal stenosis resulting in pseudoclaudication. This finding is supported by the opinion of medical expert, Dr. Barnes, who testified that, in his opinion, the claimant did not meet or equal a medical listing. The undersigned gives significant weight to this opinion from Dr. Barnes, as it is consistent with the evidence in the record. Namely, in supporting this opinion, Dr. Barnes indicated that positive straight leg raising was not found on most of the examinations, as will be discussed in more detail below. Furthermore, Dr. Barnes noted that the physical findings of numbness, reflex changes, and atrophy were not consistently present over a 12-month period, consistent with the medical records. In addition, the MRI findings in the record, as discussed below, reflect only mild-to-moderate degenerative changes with no more than mild stenosis (Exhibits B2F/9, B12F/6, B22F/45, and B30F/22).

In making this finding regarding listing 1.04, the undersigned give little weight to the medical opinion of Alexander J. Ghanayem, M.D., who opined that the claimant "met and exceeded the criteria set forth for disability related to disorders of the spine as listed in section 1.04" (Exhibit B43F). Dr. Ghanayem noted "in 2005 he had significant lumbar spine disc disease"; however, the radiologist noted in August 2005 that the claimant had "mild degenerative disc disease and facet osteoarthritis" (Exhibit B38F/3). The doctor then noted that, by December 2009, the claimant's lumbar spine

"showed significant and diffuse evidence of lumbar disc disease"; yet, the MRI study dated December 05, 2009, and re-interpreted on January 19, 2010, revealed no more than moderate abnormalities with no evidence of spinal canal stenosis, neural foramina stenosis, or disc protrusion (Exhibits B2F/9 and B12F/6). Mild-to-moderate degenerative changes were seen on a 2013 lumbar spine MRI, and an October 2014 MRI revealed only mild central canal stenosis (Exhibits B22F/45 and B30F/22). Dr. Ghanayem's opinion is contrary to the objective findings of multiple radiologists who reviewed the claimant's images. The undersigned also notes that Dr. Ghanayem only reviewed the claimant's medical records and never had the opportunity to examine, or even meet with and question, the claimant (Exhibit B43F).

The record does not show that the claimant has the required FEV_1 values, chronic restrictive ventilator disease with commensurate FVC values, or chronic impairment of gas exchange due to clinically documented pulmonary disease with applicable DLCO or arterial blood gas values that meet listing 3.02 for chronic pulmonary insufficiency (Exhibit B22F/62). Further, the record does not support a finding that the claimant has asthma attacks that meet the listing of 3.03 for asthma.

Moreover, the claimant does not meet listing 5.05 for chronic liver disease. The record does not contain evidence of hemorrhaging from esophageal, gastric, or ectopic varices or from portal hypertensive gastropathy; ascites or hydrothorax not attributable to other causes, present on at least 2 evaluations at least 60 days apart

within a consecutive 6-month period; spontaneous bacterial peritonitis with peritoneal fluid containing an absolute neutrophil count of at least 250 cells/mm3; hepatorenal syndrome with serum creatinine elevation of at least 2 mg/dL, oliguria with 24-hour urine output less than 500 mL, or sodium retention with urine sodium less than 10 mEq per liter; hepatopulmonary syndrome; hepatic encephalopathy; or end stage liver disease.

The severity of the claimant's mental impairments, considered singly and in combination, do not meet or medically equal the criteria of listings 12.04 and 12.06. In making this finding, the undersigned has considered whether the "paragraph B" criteria are satisfied. To satisfy the "paragraph B" criteria, the mental impairments must result in at least two of the following: marked restriction of activities of daily living; marked difficulties in maintaining social functioning; marked difficulties in maintaining concentration, persistence, or pace; or repeated episodes of decompensation, each of extended duration. A marked limitation means more than moderate but less than extreme. Repeated episodes of decompensation, each of extended duration, means three episodes within 1 year, or an average of once every 4 months, each lasting for at least 2 weeks.

In activities of daily living, the claimant has no restrictions. The claimant reported to the consultative mental status examiner in June 2010 that he read the newspaper, prepared simple meals, visited his son at least twice a week, drove, and took care of his basic needs on a consistent basis (Exhibit B5F/2). He also indicated in July 2013 that he did some laundry, shopped, cashed checks, provided childcare, watched television,

ran errands, played video games, and made appointments (Exhibit B24F/2). Therefore, the claimant has no limitations in activities of daily living.

In social functioning, the claimant has mild to moderate difficulties. According to the Field Office Disability Report, the claimant was pleasant and had no discernable issues with talking or answering (Exhibit B1E). He repo1ied to the consultative examiner in June 2010 that he was currently living with his mother, with whom get [sic] got along "okay" (Exhibit B5F/2). Throughout the treatment records from Hegira, he reported isolating himself from others (Exhibits B18F, B21F, B27F, and B28F). He also described difficulty getting along with others in his Function Report (Exhibit B14E). However, he reported he visited his son at least twice a week and shopped in stores. For these reasons, the undersigned finds the claimant has mild limitations in social functioning.

With regard to concentration, persistence, or pace, the claimant has moderate difficulties. The Field Office Disability Report reflects no perceived difficulties in understanding, coherency, or concentrating and indicates that he was well organized and easily answered all questions (Exhibit B1E). Mental status examination in July 2013 revealed adequate contact with reality, intact insight and judgment, cooperative and verbally responsive behavior, good eye contact, logical and organized stream of mental activity, clear and understandable speech, age-appropriate content of communication, no visual or auditory hallucinations, pleasant emotional reaction but tearing up and reserved, depressed mood, and average concentration, attention,

persistence, and effort (Exhibit B24F/2-4). Thus, the undersigned finds the claimant moderately limited with regard to concentration, persistence, or pace.

As for episodes of decompensation, the claimant has experienced one or two episodes of decompensation, which have been of extended duration. Specifically, in December 2010, the claimant was hospitalized for a suicide attempt (Exhibits B13F and B16F). However, the record does not contain evidence of further psychiatric hospitalization, significant changes in dosage or type of psychotropic medications, or other such evidence that constitutes additional episodes of decompensation, each of extended duration.

Because the claimant's mental impairments do not cause at least two "marked" limitations or one "marked" limitation and "repeated" episodes of decompensation, each of extended duration, the "paragraph B" criteria are not satisfied.

The undersigned has also considered whether the "paragraph C" criteria are satisfied. The claimant does not meet the requirements of listing 12.04C because he does not have a medically documented history of a chronic affective disorder of at least 2 years' duration that has caused more than a minimal limitation of ability to do basic work activities, with symptoms or signs currently attenuated by medication or psychosocial support, and one of the following: repeated episodes of decompensation, each of extended duration; or a residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause the individual to decompensate; or

current history of 1 or more years' inability to function outside a highly supportive living arrangement, with an indication of continued need for such an arrangement.

The limitations identified in the "paragraph B" criteria are not a residual functional capacity assessment but are used to rate the severity of mental impairments at steps 2 and 3 of the sequential evaluation process. The mental residual functional capacity assessment used at steps 4 and 5 of the sequential evaluation process requires a more detailed assessment by itemizing various functions contained in the broad categories found in paragraph B of the adult mental disorders listings in 12.00 of the Listing of Impairments (SSR 96-8p). Therefore, the following residual functional capacity assessment reflects the degree of limitation the undersigned has found in the "paragraph B" mental function analysis.

5. After careful consideration of the entire record, the undersigned finds that since October 28, 2009, the claimant has the residual functional capacity to perform sedentary work as defined in 20 CFR 404.1567(a) and 416.967(a) except requires work in a relatively clean air work environment, such as no fumes, gases, concentrated dust or other pollutants; no climbing of ladders, ropes, or scaffolds; no climbing of ramps or stairs; no crawling; occasional stooping, crouching, or kneeling; occasional flexion, extension, or rotation of the neck; no operation at hazardous heights or around dangerous machinery; no operation in temperature extremes; no work in food service or medical assistance areas; requires a sit/stand option at will, but not to exceed 30 minutes at a time in either position; is limited to simple, routine tasks

such as those jobs at the SVP 1or 2 level due to pain, fatigue, and depression causing occasional limitations in ability to maintain concentration for extended periods, but not off task for more than 10% of the workday, as well as occasional limitations in ability to carry out detailed instructions; requires use of a cane for prolonged ambulation; and is limited to brief and superficial interaction (i.e. infrequent and not very involved) with the public, coworkers, and supervisors.

In making this finding, the undersigned has considered all symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence, based on the requirements of 20 CFR 404.1529 and 416.929 and SSRs 96-4p and 96-7p. The undersigned has also considered opinion evidence in accordance with the requirements of 20 CFR 404.1527 and 416.927 and SSRs 96-2p, 96-5p, 96-6p and 06-3p.

The prior finding in the October 2009 decision concerning the claimant's residual functional capacity is binding absent evidence of an improvement or change in condition since the prior hearing. *See, Drummond v Commissioner of Social Security*, 126 F.3d 837 (6th Cir. 1997); Acquiescence Ruling 98-4(6) (SSA must adopt a finding of a claimant's residual functional capacity or other finding required under the applicable sequential evaluation process for determining disability, made in the final decision by an ALJ or Appeals Council on a prior disability claim unless new and additional evidence or changed circumstances provide a basis for a different finding of the claimant's residual functional capacity).

As explained in the analysis below, the undersigned finds that the evidence of record shows that there has been a change in the claimant's condition since the prior decision and that the substantial evidence of record supports the aforementioned residual functional capacity. Specifically, new evidence regarding the claimant's back disorder, asthma, and hepatitis C supports the change in the residual functional capacity to the point where the light exertional level is no longer appropriate.

In considering the claimant's symptoms, the undersigned must follow a two-step process in which it must first be determined whether there is an underlying medically determinable physical or mental impairment(s)—i.e., an impairment(s) that can be shown by medically acceptable clinical and laboratory diagnostic techniques—that could reasonably be expected to produce the claimant's pain or other symptoms.

Second, once an underlying physical or mental impairment(s) that could reasonably be expected to produce the claimant's pain or other symptoms has been shown, the undersigned must evaluate the intensity, persistence, and limiting effects of the claimant's symptoms to determine the extent to which they limit the claimant's ability to do basic work activities. For this purpose, whenever statements about the intensity, persistence, or functionally limiting effects of pain or other symptoms are not substantiated by objective medical evidence, the undersigned must make a finding on the credibility of the statements based on a consideration of the entire case record.

The claimant alleged disability due to degenerative disc disease, hepatitis C, and depression (Exhibit B2E). At the hearing, he testified that he injured himself in 1982 while lifting a television and continued working through 2005. The claimant described a sharp pain in his lower back along with tenseness in the middle back and radiation to the shoulder and neck. He testified that he had to alternate between positions about every 5-10 minutes. The claimant reported that he was scheduled for surgery in July 2015, but he was looking for a second opinion. He also testified to tearing his rotator cuff while reaching for his pillow. The claimant indicated that he shopped once a month with his mother, did laundry about once a week, prepared simple meals, and drove no more than 10-15 minutes at a time. He testified to having hepatitis C that caused symptoms of exhaustion and fatigue. The claimant reported using a cane since 2006 or 2007, noting that he was recently prescribed a walker that was not covered by insurance. He estimated being able to lift 5 pounds of weight. The claimant also testified to having asthma, and he reported last using his inhaler a week prior.

After careful consideration of the evidence, the undersigned finds that the claimant's medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, the claimant's statements concerning the intensity, persistence, and limiting effects of these symptoms are not entirely credible for the reasons explained in this decision.

The medical records support a finding that the restricted sedentary exertional level is most appropriate. According to neurological progress notes from J.U.

DeSousa, M.D., dated October 2, 2009, the claimant was taking Vicodin twice a day, and his quality of life improved, noting that he was doing exercises and playing football with his son (Exhibit B1F/9). Dr. DeSousa advised that he would not suggest surgery (Exhibit B1F/9). An abdominal ultrasound from December 2009 returned negative (Exhibit B1F/23). An MRI of the lumbosacral spine dated December 05, 2009, and re-interpreted on January 19, 2010, revealed moderate spondylosis at L4-L5 and L5-S1 with moderate spondyloarthrosis at L3-L4, L4-L5, and L5-S1; moderate facet joint arthritis at L3-L4, L4-L5, and L5-S1; but no evidence of spinal canal stenosis, neural foramina stenosis, or disc protrusion (Exhibits B2F/9 and B12F/6).

The claimant was seen at the Oakwood Heritage Center Pain Management Center on January 28, 2010, regarding his back pain since 1984 (Exhibit B2F/9). At the time, he was on methadone 10 mg, Flexeril, and Robaxin, and he reported his pain level at 4/10 in severity (Exhibit B2F/10). In February and April 2010, the claimant received lumbar medial branch blocks, and in March 2010, he underwent radiofrequency ablation at multiple lumbar levels (Exhibits B2F/16, 18 and B9F). The claimant was discharged from Dr. DeSousa's care on March 19, 2010 (Exhibit B10F/27).

A liver biopsy from July 2010 revealed evidence of chronic hepatitis C with minimal activity and slight periportal fibrosis (Exhibit B8F/29). The claimant received lumbar epidural injections in October and November 2010 (Exhibit B11F). On January 6, 2011, the claimant was seen at Oakwood Hospital for side effects

from his hepatitis C treatment and back pain, but he was released in stable condition the same day (Exhibits B8F/32 and B13F/1-11). The claimant reported "self-withdrawal from methadone" and that "Demerol help[ed] his pain" (Exhibit B13F/6). Lab results and physical examination were normal except for muscle spasm in the back (Exhibit B14F/5).

The claimant received bilateral medial branch blocks on April 6, 2011, and indicated that his pain level was 1/10 in severity (Exhibits B11F/27 and B20F/16). On April 26, 2011, the claimant indicated that his pain was "much better" after the injections (Exhibit B11F/29). Physical examination on May 6, 2011, revealed negative straight leg raising bilaterally in the supine and sitting positions, slightly decreased motor strength in the right hip flexors and knee extensors, and normal reflexes and sensory modalities (Exhibit B12F/3). The claimant underwent further lumbar radiofrequency ablation in May and July 2011 (Exhibits B11F/39 and B20F/10). Bilateral sacroiliac joint injections were also administered on June 28, 2011 (Exhibit B20F/12).

Another MRI of the lumbar spine from October 26, 2011, showed mild degenerative facet joint changes with no evidence of disc protrusion or spinal stenosis and widely patent neural foramina (Exhibit B20F/3). The claimant received a lumbar spine injection on December 23, 2011, which provided immediate relief (Exhibit B17F/5). On January 20, 2012, he reported feeling better physically and that physical therapy was helpful (Exhibit B17F/2). He also noted that the injections provided at the prior office visit were "extremely beneficial" (Exhibit B17F/2). On April 5, 2012, the claimant was seen by

Mohamad Osman, M.D., of Great Lakes Pain Management, where he was switched to morphine 30 mg, and the Norco 7.5 was increased (Exhibit B20F/9).

An EMG of the lower extremities from May 11, 2012, showed evidence of chronic radiculopathy at L2-L3, L4-L5, and L5-S1 on both sides (Exhibit B17F/18). In May 2012, November 2012, and February 2013, the claimant received lumbar medial branch injections at the facet joints (Exhibit B20F/28-38).

The claimant was seen at the hepatitis clinic on June 12, 2012, where he denied treatment for this condition since 2010 (Exhibit B20F/4). An ultrasound of the abdomen was unremarkable, and a duplex assessment of the hepatic vasculature and portal vein were normal (Exhibit B20F/5).

An October 18, 2012, pulmonary function test showed moderate airway obstruction with marked improvement post bronchodilator (Exhibit B22F/62). As of that date, the claimant was started on Qvar and Ventolin inhalers for asthma (Exhibit B22F/20). He was neurologically intact, and he exhibited normal gait and station (Exhibit B22F/19-20). A renal ultrasound from October 20, 2012, returned negative (Exhibit B22F/61). The claimant began physical therapy on October 30, 2012, for his back pain (Exhibit B22F/57).

Another MRI of the lumbar spine from April 15, 2013, showed mild-to-moderate degenerative change, worst at the L4-L5 and L5-S1 levels (Exhibit B22F/45). Lab results, dated April 25, 2013, showed GFR of 85, reflecting mild chronic kidney disease (Exhibit B22F/26). In April 2013, he received further lumbar

epidural steroid injections followed by transforaminal selective nerve root blocks in July and August 2013 (Exhibit B24F).

The claimant was seen at the liver clinic at U of M hospital regarding his hepatitis C (Exhibit B26F/6). Physical examination was relative [sic] unremarkable, and he was informed that he would not have great progression in the disease over the next few years and could afford to wait for non-interferon treatments (Exhibit B26F/8).

On July 2, 2013, the claimant underwent an internal medicine consultative examination with Jack Salomon, M.D., where physical examination revealed lungs clear to auscultation and percussion, no audible wheezing, no evidence of liver distension or tenderness, no hepatosplenomegaly, no edema, positive straight leg raising bilaterally, negative Phalen's and Tinel's, good grip bilaterally, ability to get on and off the table, ability to heel walk and toe walk with back pain, no need for ambulatory device to help walk, intact deep tendon reflexes, limited range of motion of the lumbar spine and bilateral knees, slightly decreased range of motion of the cervical spine, and normal range of motion of all other tested joints (Exhibit B23F). Dr. Salomon indicated that the claimant had lumbar radiculopathy and probably hepatitis C (Exhibit B23F/3).

At a hepatitis C follow up in April 2014, physical examination was unremarkable (Exhibit B26F/14). The claimant was prescribed an adjustable quad cane for lumbar radiculopathy by Dr. Osman of Great Lakes Pain Management (Exhibit B41F). On May 22, 2014, the claimant reported to Nicholas Packey, D.O., that he was

off methadone and doing well, noting that the back injections helped "some" (Exhibit B29F/6). As of June 18, 2014, he was using pain medications "once in a while as needed" (Exhibit B29F/4). The claimant received additional epidural injections in August 2014 (Exhibit B30F). On September 29, 2014, the claimant reported feeling well with no complaints (Exhibit B29F/2).

An October 19, 2014 lumbar spine MRI showed mild multilevel degenerative disc disease, most pronounced at L4-L5, resulting in mild central canal stenosis (Exhibit B30F/22). Mohammed Zaman, M.D., prescribed the claimant a walker for chronic back pain on November 14, 2014 (Exhibit B41F/1). A cervical spine MRI from December 20, 2014, was essentially unremarkable (Exhibit B33F/5). On May 23, 2015, MRIs of the cervical spine, thoracic spine, and lumbar spine were performed and showed minimal ago[sic]-related height loss of the vertebrae in the lower thoracic spine, linear enhancement within the posterior aspect of the disc at L4-L5 level suggestive of radial tear, and otherwise scattered minimal age-related changes of the cervical, thoracic, and lumbar spine (Exhibit B36F).

A State agency consultant prepared an assessment of the claimant's physical functional capabilities dated July 23, 2013, finding that the claimant could perform work at the light exertional level (Exhibit B9A). The State agency medical consultant's physical assessment is given little weight because evidence received at the hearing level shows that the claimant is more limited than determined by the State agency consultant. Furthermore, the State agency consultant did not adequately consider the claimant's subjective

complaints. Specifically, considering the claimant's degenerative disc disease of the lumbar spine with mild central canal stenosis, when combined with the effects of his asthma and hepatitis C, he would be incapable of work above the sedentary level with no climbing or crawling. In addition, due to the asthma and hepatitis C, he requires work in a relatively clean air work environment and no operation in temperature extremes. Because of the hepatitis C diagnosis, he cannot work in food service or medical assistance areas. Because of the back issues, he requires use of a cane, per doctor's instructions, and the ability to sit and stand every 30 minutes. The claimant also reported radiation of his back pain into the neck, and thus, he requires only occasional flexion, extension, or rotation of the neck.

As for the claimant's mental issues, he underwent a consultative mental status examination on June 30, 2010, with H. Gummadi, M.D. (Exhibit B5F). Mental status examination revealed low self-esteem, some psychomotor retardation, motivation to get better, no tendency to exaggerate symptoms, insight into his problems, spontaneous and logical thoughts that were goal-directed, no loose associations or flight of ideas noted, no auditory or visual hallucinations, no suicidal or homicidal ideations, depressed mood, somewhat tearful affect at times, orientation x 3, and intact general fund of information and calculational skills (Exhibit B5F). The claimant was diagnosed with mood disorder secondary to general medical condition, rule out dysthymia, rule out alcohol abuse, and a GAF of 50, reflective of serious mental symptom (Exhibit B5F/3).

On December 27, 2010, the claimant presented to the ER with depressive symptoms and suicidal ideation (Exhibit B13F/13). He was admitted to BCA of Detroit, where it was noted that the claimant had been noncompliant with psych medications, took a gun and held it to his chin, but when he pulled the trigger, it was not loaded (Exhibit B16F/4). On December 29, 2010, he was assessed a GAF of 20 (Exhibit B16F/23). The claimant was discharged on December 31, 2010, from BCA, with the final diagnosis of depression and prescriptions for Desyrel, Celexa, and Vistaril (Exhibit B15F/6).

The claimant subsequently began treating through Hegira Programs on January 3, 2011 (Exhibit B15F/19). According to Hegira progress notes, dated March 16, 2011, the claimant reported that, after his primary care physician refused to write a script for Desyrel, he went to Oakwood Hospital and told them that he tried to commit suicide and told a lie so that they would give him a prescription for Desyrel (Exhibit B15F/11). Mental status examination on that date revealed unremarkable general appearance, appropriate motor activity to age, anxious/tense mood with congruent affect, appropriate behavior, orientation x 3, goal-directed thoughts, normal memory, poor judgment, and poor impulse control (Exhibit B15F/18). He was assessed a GAF of 44 on March 16, 2011, and 45 on March 26, 2011 (Exhibits B21F/10 and B28F/64).

According to September 14, 2011, progress notes from Hegira, the claimant had intact attention/concentration and euthymic mood (Exhibit B18F/42). On January 18, 2012, he presented as depressed and tearful but without suicidal thoughts (Exhibit B18F/55). As of September

11, 2012, the claimant reported only taking Ativan as prescribed but no other medication (Exhibit B21F/101). On September 28, 2012, he indicated that he was telling Gianina Cristiu, NP about not taking medication because he did not want to hurt his chances of obtaining SSI (Exhibit B21F/107). Mental status examination on October 18, 2012, revealed normal mood and affect, orientation x 3, appropriate judgment, and no impairment of long-term or short-term memory (Exhibit B22F/20).

The claimant reported on December 20, 2012, that he was taking Trazodone and Ativan 0.5 mg but stopped taking Wellbutrin because he was "doing well without it" (Exhibit B21F/26). He noted on December 27, 2012, that staying busy, getting out of the house, and spending time with his son were things that improved his mood and quality of life (Exhibit B21F/119). On January 25, 2013, the claimant noted that he was living with his ex-wife and son, which improved his mood due to socializing with others and going places with them (Exhibit B21F/128). The claimant indicated on April 8, 2013, that he was "feeling extremely depressed recently" and partially attributed this to being denied for SSI (Exhibit B21F/134). As of November 11, 2013, the claimant's GAF was 45 (Exhibit B27F/37).

On July 11, 2013, the claimant underwent another consultative mental status examination, this time with Hugh Bray, Ph.D., where examination revealed adequate contact with reality, poor self-esteem, intact insight and judgment, cooperative and verbally responsive behavior, good eye contact, logical and organized stream of mental activity, clear and

understandable speech, age-appropriate content of communication, no visual or auditory hallucinations, pleasant emotional reaction but tearing up and reserved, depressed mood, and average concentration, attention, persistence, and effort (Exhibit B24F/2-4). The claimant was diagnosed with major depressive disorder and a GAF of 55, indicative of moderate mental symptomatology (Exhibit B24F/4).

Records indicate that the claimant continued treating at Hegira through June 2014 (Exhibits B27F and B28F). On that date, he was described as having a euthymic mood, intact attention and concentration, and stable sleep, weight, and appetite (Exhibit B27F/4-5).

As for opinion evidence, Dr. Gummadi prepared the following mental Medical Source Statement at the end of his examination:

> Based on today's exam, the claimant is able to understand, retain and follow instructions and restricted to performing simple routine repetitive tasks. Due to his depression with physical problems, he is restricted to work that involves brief and superficial interactions with coworkers, supervisors and the public.

(Exhibit B5F/3). Dr. Bray also prepared the following mental Medical Source Statement at the conclusion of his examination:

1. The claimant's mental ability to relate to others, including fellow workers and supervisors is moderately impaired. In interacting with the examiner today the

claimant was able to form a rapport with the examiner.

2. The claimant's mental ability to understand, remember and carry out tasks appears to be moderately impaired. In interacting with the examiner today the claimant was able to perform simple repetitive tasks. It is likely the claimant could handle more complex tasks. Difficulty n[sic] performing multiple step tasks is likely to be moderate.

3. The claimant's mental ability to maintain attention, concentration, persistence, pace and effort is moderately impaired.

4. The claimant's mental ability to withstand stress and pressure associated with day-to-day work activities is moderately impaired.

(Exhibit B24F/4). The undersigned gives great weight to the opinion of Drs. Gummadi and Bray, as they are consistent with the evidence in the record. Although the claimant has noted issues with wanting to isolate himself, as described throughout the Hegira records, he reported shopping in stores, living with his mother, and that getting out of the house and spending time with his son were things that improved his mood and quality of life (Exhibits B14E and B21F/119). Thus, he is capable of handling work with only brief and superficial interaction with the public, coworkers, and supervisors. Furthermore, the claimant indicated that he prepared simple meals, drove, watched television, did laundry,

shopped in stores, and read, which would support a finding that he is capable of simple, routine tasks (Exhibit B14E; testimony).

A Psychiatric/Psychological Examination Report was prepared by Gianina Cristiu, NP from Hegira Programs on February 28, 2012, noting that the claimant had major depressive disorder and a GAF of 40 (Exhibit B19F/3). Limited weight is given to this very low GAF score, as it conflicts internally with the less-than-serious clinical findings on mental status examination that note cooperative behavior, goal-oriented thought process, orientation x 4, adequate concentration, good memory, and impaired judgment and impulse control (Exhibit B19F/3). In any event, a nurse practitioner is not an acceptable medical source, and thus, cannot issue a medical opinion (*See* 20 CFR 404.1513(a), 404.1527(a)(2), 416.913(a), and 416.927(a)(2)).

Medical Examination Reports were prepared by Howard Wright, D.O., on April 25, 2013, and October 7, 2013, indicating that the claimant could occasionally lift/carry less than 10 pounds of weight, stand/walk for less than 2 of 8 hours, sit for less than 6 of 8 hours, never push/pull or finely manipulate, and was limited in comprehension, memory, sustained concentration, following simple directions, reading, writing, and social interaction (Exhibits B22F/41-43 and B34F). Dr. Wright then prepared a Medical Source Statement on July 10, 2015, indicating that he was incapable of even "low stress" jobs, could not walk even one city block without pain, could sit for less than 2 of 8 hours total, could stand/walk for less than 2 of 8 hour [sic] total, could occasionally life [sic] or carry less than 10 pounds of

weight, had pain and other symptoms that would "constantly" interfere with his attention and concentration, and would miss more than four days of work per month (Exhibit B31F). The undersigned gives minimal weight to Dr. Wright's opinions for numerous reasons. First, despite preparing the most recent disabling opinion in July 2015, the doctor admitted to not having seen the claimant since April 2013, or over two years prior (Exhibit B31F/1). Moreover, the objective medical evidence in the record does not support the significant limitations proposed by Dr. Wright. Most notably, the numerous MRI studies showed no more than mild-to-moderate degenerative findings, which is inconsistent with Dr. Wright's suggestions.

At the conclusion of the consultative examination, Dr. Salomon opined that the claimant was "not very functional" (Exhibit B23F/3). The undersigned gives little weight to Dr. Salomon's opinion, as he does not give specific functional limitations but merely makes a blanket statement. Moreover, Dr. Salomon only examined the claimant on one occasion, and thus, has no treating relationship with the claimant. Although Dr. Salomon found positive straight leg raising upon examination, the diagnostic findings on the various MRIs do not support the disabling statement from the examiner.

At the second hearing, Dr. Barnes opined that the claimant could occasionally lift 10 pounds of weight and frequently lift 5 pounds of weight; sit for 8 hours of the day, a couple hours at a time; stand or walk for 2-4 hours, in increments of about a half hour at a time before having to sit down for about 10 minutes; and could squat to pick

up 10 pounds but not bend at the waist to do so. The undersigned also gives great weight to this portion of Dr. Barnes' opinion, as it is supported by the evidence in the record. The various MRI studies and multiple back injections evidence the fact that the claimant has abnormalities in the back that functionally limit the claimant to the point where he is incapable of work above the sedentary level. However, the mild nature of the abnormalities, as described in numerous radiological findings, suggests that he is not further limited to the point where he could not do the above on a consistent basis.

The claimant was assessed a wide range of GAF scores between 20 and 55 throughout the medical records. On one end, A GAF of 20 indicates some danger of hurting self or others. Conversely, a GAF of 55 is reflective of only moderate symptoms. The undersigned gives greater weight to the moderate GAF score, as it is supported by the evidence in the record. Namely, the various mental status examination throughout the record evidence clinical abnormalities but nothing that would support a serous [sic] finding (Exhibits B5F, B15F, B22F, and B24F). For these reasons, little weight is given to the more serious GAF scores (i.e. 45 and below).

State agency psychological consultant, Edward Czarnecki, Ph.D., determined on August 12, 2010, that the claimant retained the mental capacity to sustain an independent routine of simple tasks (Exhibits B6F and B7F). Similarly, on July 23, 2013, Dr. Czarnecki determined that the claimant could perform simple, rote, repetitive unskilled work (Exhibit B9A). The

undersigned gives great weight to the opinions of Dr. Czarnecki, as they are supported by the opinions of consultative examiners Drs. Gummadi and Bray, who both determined that the claimant could perform simple routine work (Exhibits B5F and B24F).

The undersigned has also considered a State of Michigan Department of Human Services decision authored by a State ALJ on August 13, 2012, finding the claimant was disabled for purposes of the Medical Assistance and State Disability Assistance programs (Exhibit B19F). Although the undersigned has considered this evidence pursuant to 20 CFR 404.1512 and 416.912 and SSR 06-3p, the undersigned notes that the issue of disability is ultimately reserved to the Commissioner (20 CFR 404.1527(e)(2) and 419.927(e)(1) and SSR 96-5p). Additionally, the regulations specifically provide that a determination made by another agency, although cannot be ignored, is not binding on the administrative law judge (20 CFR 404.1504 and 416.904).

The undersigned also considered the Third Party Function Reports, prepared by the claimant's mother, Rita Biestek, on April 18, 2010, and April 24, 2013, which are mostly consistent with the claimant's Function Report (Exhibits B5E, B12E, and B14E). As the claimant's statements concerning the intensity, persistence, and limiting effects of his symptoms are not entirely credible, as indicated elsewhere in the decision, little weight is attributed to these Third Party Function Reports. Nevertheless, Ms. Biestek is not an acceptable medical source, and thus, cannot issue a medical opinion (*See* 20 CFR 404.1513(a), 404.1527(a)(2), 416.913(a), and 416.927(a)(2)).

In assessing the credibility of the claimant, the undersigned notes that the treatment for his various impairments were described as being relatively effective in controlling his symptoms. For instance, in January 2011, he reported that "Demerol help[ed] his pain" (Exhibit B13F/6). The claimant received bilateral medial branch blocks on April 6, 2011, and indicated that his pain level was 1/10 in severity (Exhibits B11F/27 and B20F/16). On January 20, 2012, he reported that physical therapy was helpful and that the injections provided at the prior office visit were "extremely beneficial" (Exhibit B17F/2). On May 22, 2014, the claimant reported that the back injections helped "some" (Exhibit B29F/6). The relative effectiveness of the treatment diminishes the credibility of the completely disabling allegations and supports a finding that he has been capable of performing work within the restricted range of sedentary work identified.

At one point or another in the record (either in forms completed in connection with the application and appeal, in medical reports or records, or in the claimant's testimony), the claimant reported the following daily activities: reading the newspaper, preparing simple meals, visiting his son at least twice a week, driving, taking care of his basic needs on a consistent basis, doing some laundry, shopping, cashing checks, providing childcare, watching television, running errands, playing video games, and making appointments (Exhibits B14E, B5F, and B24F/2; testimony). These activities require functioning within the limited range of sedentary work identified.

The undersigned also notes that the claimant has been noncompliant with prescribed treatment. Most notably, records from Hegira reflect numerous no shows and cancelations by the claimant (Exhibits B18F, B21F, B27F, and B28F). Moreover, as of June 18, 2014, he reported only using pain medications "once in a while as needed" (Exhibit B29F/4). The claimant's noncompliance with his treatment suggests that the symptoms may not be as limiting as the claimant has alleged in connection with this application and reflects poorly on the credibility of his allegations.

In sum, the above residual functional capacity assessment is supported by the medical records in the file, the relative effectiveness of the prescribed treatment, his activities of daily living, the noncompliance with mental health treatment, and the opinion of medical expert Dr. Barnes.

6. Since October 28, 2009, the claimant has been unable to perform any past relevant work (20 CFR 404.1565 and 416.965).

Pursuant to *Dennard v Secretary of Health and Human Services*, 907 F.2d 598 (6th Cir. 1990) and Acquiescence Ruling 98-3(6), the undersigned must adopt a finding of the demands of a claimant's past relevant work made in the final decision by the ALJ or Appeals Council on the prior disability claim absent new and material evidence relating to such a finding or a change in the law, regulations, or rulings affecting the finding. The ALJ in the 2009 decision found that the claimant had past relevant work as a scaffold builder (semi-skilled/heavy) (Exhibit B1A/9). The vocational expert in the instant hearing had an opportunity to hear claimant's

description of his duties and how much weight was involved—18-24 pounds, thus allowing for a more accurate classification of the prior relevant work as carpenter (scaffold builder),(semiskilled/medium). This testimony was not a part of the oral record in the earlier hearing. This is new and material evidence in the record making the earlier finding none binding. Thus, the job as classified in the hearing at issue constitutes the claimant's past relevant work for purposes of this decision. As the job required the medium exertional level, the claimant is unable to perform past relevant work.

7. Prior to the established disability onset date, the claimant was a younger individual age 45-49. On May [redacted] 2013, the claimant's age category changed to an individual closely approaching advanced age (20 CFR 404.1563 and 416.963).

8. The claimant has at least a high school education and is able to communicate in English (20 CFR 404.1564 and 416.964).

9. Prior to May [redacted] 2013, transferability of job skills is not material to the determination of disability because using the Medical-Vocational Rules as a framework supports a finding that the claimant is "not disabled" whether or not the claimant has transferable job skills. Beginning on May [redacted] 2013, the claimant has not been able to transfer job skills to other occupations (See SSR 82-41 and 20 CFR Part 404, Subpart P, Appendix 2).

10. Prior to May [redacted] 2013, the date the claimant's age category changed, considering the claimant's age,

education, work experience, and residual functional capacity, there were jobs that existed in significant numbers in the national economy that the claimant could have performed (20 CFR 404.1569, 404.1569a, 416.969, and 416.969a).

In determining whether a successful adjustment to other work can be made, the undersigned must consider the claimant's residual functional capacity, age, education, and work experience in conjunction with the Medical-Vocational Guidelines, 20 CFR Part 404, Subpart P, Appendix 2. If the claimant can perform all or substantially all of the exertional demands at a given level of exertion, the medical-vocational rules direct a conclusion of either "disabled" or "not disabled" depending upon the claimant's specific vocational profile (SSR 83-11). When the claimant cannot perform substantially all of the exertional demands of work at a given level of exertion and/or has nonexertional limitations, the medical-vocational rules are used as a framework for decision-making unless there is a rule that directs a conclusion of "disabled" without considering the additional exertional and/or nonexertional limitations (SSRs 83-12 and 83-14). If the claimant has solely nonexertional limitations, section 204.00 in the Medical-Vocational Guidelines provides a framework for decision-making (SSR 85-15).

Prior to May [redacted] 2013, if the claimant had the residual functional capacity to perform the full range of sedentary work, a finding of "not disabled" would be directed by Medical-Vocational Rule 201.21. However, the claimant's ability to perform all or substantially all of the requirements of this level of work was impeded by

additional limitations. To determine the extent to which these limitations eroded the unskilled sedentary occupational base, the Administrative Law Judge asked the vocational expert whether jobs exist in the national economy for an individual with the claimant's age, education, work experience, and residual functional capacity. The vocational expert testified that given all of these factors the individual would have been able to perform the requirements of representative ***sedentary unskilled*** occupations such as a bench assembler (representative DOT No. 713.687-018), with 240,000 jobs nationally; and sorter (representative DOT No. 521.687-086), with 120,000 jobs nationally.

Pursuant to SSR 00-4p, the vocational expert stated that her testimony is consistent with information contained in the Dictionary of Occupational Titles including its companion publication, the Selected Characteristics of Occupations defined in the Revised Dictionary of Occupational Titles (SCO). The vocational expert further stated that neither publication addresses a sit/stand option, time off task, or use of a cane but the testimony is based on her knowledge and experience of the job market in Southeastern Michigan. When the testimony of a vocational expert differs from the DOT, the Administrative Law Judge may rely upon the vocational expert (Conn v. Secretary of Health and Human Services, 51 F.3d 607, 610 (6th Cir. 1995)). The undersigned finds that this is a reasonable explanation for the expansion on the information in the DOT and SCO. The vocational expert's testimony is given great weight.

Based on the testimony of the vocational expert, the undersigned finds that, prior to the established onset date of disability, considering the claimant's age, education, work experience, and residual functional capacity, the claimant was capable of making a successful adjustment to other work that existed in significant numbers in the national economy. Prior to May [redacted] 2013, a finding of "not disabled" is therefore appropriate under the framework of the above-cited rule in the Medical-Vocational Guidelines.

In making this finding, the undersigned considered the vocational opinion of Lee Knutson from September 23, 2015 (Exhibit B37E). The undersigned gives little weight to this opinion, as the cited jobs are not relevant to this decision (Exhibit B37E/2). Furthermore, the "light exertional" work and need to "stop work and stretch" are not part of the residual functional capacity, and thus, not pertinent to the above jobs and the respective job numbers.

11. Beginning on May [redacted] 2013, the date the claimant's age category changed, considering the claimant's age, education, work experience, and residual functional capacity, there are no jobs that exist in significant numbers in the national economy that the claimant could perform (20 CFR 404.1560(c), 404.1566, 416.960(c), and 416.966).

Beginning on the date the claimant's age category changed, considering the claimant's age, education, and work experience, a finding of "disabled" is reached by direct application of Medical-Vocational Rule 201.14.

12. The claimant was not disabled prior to May [redacted] 2013, but became disabled on that date and has continued to be disabled through the date of this decision (20 CFR 404.1520(g) and 416.920(g)).

13. The claimant was not under a disability within the meaning of the Social Security Act at any time through December 31, 2010, the date last insured (20 CFR 404.315(a) and 404.320(b)).

DECISION

Based on the application for a period of disability and disability insurance benefits filed on March 25, 2010, the claimant was not disabled under sections 216(i) and 223(d), respectively, of the Social Security Act through December 31, 2010, the date last insured.

Based on the application for supplemental security income filed on March 25, 2010, the claimant has been disabled under section 1614(a)(3)(A) of the Social Security Act beginning on May [redacted] 2013.

The component of the Social Security Administration responsible for authorizing supplemental security income will advise the claimant regarding the nondisability requirements for these payments, and if eligible, the amount and the months for which payment will be made.

/s/
Ethel Revels
Administrative Law Judge

November 24, 2015
Date

Appendix E

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY ADJUDICATION AND REVIEW

In the case of Michael John Biestek (Claimant) (Wage Earner) (Leave blank in Title XVI Cases or if name is same as above)	**TRANSCRIPT** Claim for Period of Disability Disability Insurance Benefits Supplemental Security Income [REDACTED] (Social Security Number)

Hearing Held

at

Detroit, Michigan

(Room No., Building, Street Address, City, State)

On

July 21, 2015

(Month, Day, Year)

By

Ethel Revels

(Administrative Law Judge)

APPEARANCES:

Michael John Biestek, the Claimant
Frederick J. Daley, Jr., Attorney for Claimant
Erin M. O'Callaghan, MA, CRC,
Vocational Expert

* * * *

[58] Are there a sample of jobs that you can identify at that light exertional level with those limitations?

A There would be jobs for such a person. There'd be light, unskilled work such as a bench assembler. There would be 6,000 jobs in Southeast Michigan, 450,000 in the national economy, a representative DOT code of 706.684-022. An inspector, with 10,000 jobs – I'm sorry, Your Honor, with 8,000 jobs in Southeast Michigan, 450,000 in the national economy, a representative DOT code of 762.687-014.

There would be jobs such as a lobby attendant or a badge checker. There would be 2,000 jobs in Southeast Michigan, 100,000 in the national economy, a representative DOT code of 239.567-010.

[59] Q And for purposes of a second hypothetical – I'm sorry, with those limitations, are you – if I were to find that such a person could perform work at the sedentary level, are there a sampling of jobs that you could identify at that exertion level for me with those limitations?

A Yes, Your Honor, there would be jobs such as a bench assembler with 3,000 jobs in Southeast Michigan, 240,000 in the national economy, a representative DOT code of 713.687-018; jobs as a sorter with 1,500 jobs in Southeast Michigan, 120,000 in the national economy, a representative DOT code of 521.687-086; a surveillance system monitor with 1,000 jobs in Southeast Michigan, 80,000 in the national economy, a representative DOT code of 379.367-010 .

* * * *

[60] Q Are there a sampling of jobs under the sedentary exertional level if I were to find that such a person could perform work at the sedentary level that you would be able to identify?

A Yes, Your Honor, the jobs I previously testified to would still exist. There would be a reduction in the sorter and bench assembler jobs by about 20 to 30 percent.

[61] Q You have identified jobs in response to my hypotheticals. Are the requirements and classification of those jobs consistent with that of the DOT and its companion publication, the SCO?

A My testimony is consistent. I would indicate that issues relating to a sit/stand option or time off task are not addressed by the DOT and that testimony is based on my professional experience.

Q Would such a person be able – does the DOT address the use of a cane?

A It does not, Your Honor. That would also be based on my professional experience.

* * * *

[67] VE: It would be – you need to be on task a minimum of 80 percent of the workday.

BY ATTORNEY:

Q And where do you get that from?

A My professional experience.

Q That your professional experience, did you do a study?

A Talking with employers, doing job analysis on the job for these types of jobs.

Q Okay. Can you provide those job analysis?

A They would be part of people's private confidential files.

ATTY: I mean you can black that part out, but –

ALJ: I'm not requiring that, so you can use that as an appealable if she says that it's a part of her overall training over the years, as well as her confidential file of individual people.

* * * *

[71] Q Any of the jobs that you – the jobs that you gave from the DOT, can you tell me when was the last time those jobs were surveyed for the DOT?

A I'd have to look them each up individually.

Q I mean, my understanding is some are 1971 and some are 1991. Does that –

A That's correct.

Q – sound right?

A Yes, 1991 would have been the last time.

Q And is it the same with the job numbers or where are you getting those?

A No, the job numbers are updated –

Q Where are you –

A – annually.

Q And where are you getting those from?

A I'm getting them from the Bureau of Labor Statistics as well as my own individual labor market surveys.

Q Okay. Can you provide your own?

[72] A It would, again, be the same answer, as that they're part of client files.

ATTY: Yes, okay. I mean, you can take the clients' names out. It's the substance I'm looking for.

ALJ: You asked her and she's responded and I said that my ruling is that I would not require that she provide that and I'll make a note that you object to that.

* * * *

Appendix F

QUESTIONING OF THE VOCATIONAL EXPERT EXCERPT FROM HEARING AT ISSUE IN MCKINNIE V. BARNHART, 368 F.3d 907 (7th Cir. 2004)

* * * *

[59] Q And the numbers that you gave for each, can you show how you arrived at that figure?

A. That's arrived through regular market studies, Department of Labor Statistics and Census Bureaus. You might want to refer to County Business Patterns in Chicago and northwest Indiana.

Q Okay, now tell us which ones you refer to?

A I refer to them in combination, to include my personal labor market surveys in extrapolating the numbers.

Q Okay, could you make that person survey a part of the record? Do you have it with you to make a part of the record?

A No.

Q You don't have it with you but you can make it part of the record?

A Yes, if I'm asked to do so –

ALJ Is that a very extensive job? Counsel willing to pay for that?

ATTY: Well it should have already been done. The burden is on the government.

[60] ALJ: No I didn't. I didn't say that she, she didn't say that she had made a written reprot [sic] of this already. She didn't say that. She said she used this information in coming to her answers.

ATTY: Well if she used the information to come to her answers, she has to prove it. She has to have the data.

* * * *